IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC84648**
	)	
KIMBER EDWARDS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION THREE
THE HONORABLE MARK D. SEIGEL, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Kimber Edwards, the appellant, was jury-tried and convicted in St. Louis County Circuit Court of one count of first degree murder. §565.020 RSMo. The jury recommended that he be sentenced to death. Despite a request at sentencing from the daughter of the victim, Kimberly Cantrell, that he be sentenced to life with no possibility of probation or parole, the court sentenced him to death. Because a death sentence was imposed, this Court has exclusive appellate jurisdiction. Art.V,§3,Mo.Const.(as amended 1982).

STATEMENT OF FACTS

In August, 2000, Erica Edwards, the 14-year-old daughter of the divorced Kimber and Kimberly Edwards, was staying at her father's home in St. Louis along with her sisters, Tierra and Britney. (Tr993-94,1012).[1] On Wednesday, August 23, Erica called Kimberly to ascertain when Kimberly planned to pick her up. (Tr994-95). Kimberly was neither at work nor at home. (Tr995). Erica then called her Aunt Phyllis and her paternal grandmother Mildred to see if they knew Kimberly's whereabouts. (Tr996).

Phyllis, Mildred and another woman went to Kimberly's apartment around 9:30 p.m. and found it in darkness. (Tr974-76). They entered and found Kimberly who had been shot twice in the head, the shots killing her almost immediately. (Tr977-78,1132-33,1147,1150). The women called 911 and the police arrived shortly thereafter. (Tr979,1018,1039).

University City's Sergeant Coleman arrived around 9:35 p.m. and, after talking to Phyllis and Mildred, supervised the scene investigation and the rest of the case. (Tr60-61). At about 2 a.m., Coleman decided that he wanted to speak to Kimber and Kimberly's daughter, Erica. (Tr61,1241). Coleman and approximately seven other officers, from University City and St. Louis City, went to Kimber's house. (Tr61,75,112,133,1242,1281).

[1] References to the record will be as follows: Transcript(Tr); Legal File(LF); Supplemental Legal File(SuppLF), and Exhibits(Exh).

At around 3 a.m., knocking awakened Kimber, and he looked out the window to see police cars in front of his house. (Tr1819). When he answered the door, all of the officers entered the house and followed Kimber upstairs to the family's bedrooms. (Tr76,1284-85,1820-22). The officers there told Kimber that Kimberly was dead. (Tr1823). Coleman directed the other officers to take all of Kimber's weapons. (Tr76-66,131).

Coleman asked Jada, Kimber's wife, to get the children, Erica, Tierra and Britney, aged 14, 12 and 11, dressed and ordered that Kimber, Jada and the children be taken to the station for questioning. (Tr1285-86). Coleman told Kimber that he wanted to talk to him about who might have killed Kimberly. (Tr62). Jada and the children were taken to the station solely because of Coleman's order, not because they were suspects. (Tr134).

Jada told the girls to get dressed, which they did while officers remained in their bedroom. (Tr152-54,997,1763). The family was then taken to the station, a 25-45 minute drive, in separate police cars—the children in one, Kimber and Jada in another. (Tr62,78,79,157-59,999,1243,1289-90,1764). The children remained separated from the adults thereafter. (Tr156-58,1764).

When they arrived at the University City station, they took Kimber to a small interrogation room; Jada to a secretary's office and the children to the Deputy Juvenile Officer's office.(Tr79-81,1244,1290-93). Several hours later, an officer removed Erica from that office.(Tr1766-67). Phyllis told Erica that her mother had been killed. Erica's screams resounded throughout the floor.(Tr165,999).

Early on August 24, Detective Gage, at Coleman's direction, filed to have Erica removed from Kimber's custody, alleging Kimber was "a suspect in the death of the juvenile's mother" and was "being questioned and investigated for homicide at this writing."(Tr82-83,1304;ExhT). Erica was placed in DFS custody and left the station with Phyllis.(Tr983,989,1001,1826-27).

The officers questioned Jada for 1-1½ hours separately from other family members.(Tr136,1496). She was photographed and fingerprinted and hair and shoeprints were taken.(Tr86-89,1299-1301,1497). Kimber was led out of an interrogation room to watch Jada being photographed.(Tr1825).

Kimber was interrogated for at least seven hours that night.(Tr1208-10,1296,1496,1252,1305). He stated that he had been out of town earlier in the week, returning to St. Louis on the 22nd or 23rd; took his children to doctors' appointments and went to his rental property to do some electrical work.(Tr63,1210-15,1255-58). He had last seen Kimberly August 10, 2000.(Tr1194). During that interrogation, Kimber told the officers that Kimberly's actions weren't his business and he had nothing to do with her death. (Tr1189-90).[2]

In the early afternoon, the officers took Kimber, Jada and the two remaining children home in separate cars.(Tr64,90,171-72). Jada and Tierra told Kimber what had happened to them at the station.(Tr173,1829).

Officers investigating the case also spoke to Christopher and Brandon Harrington, boys who were Kimberly's next-door neighbors.(Tr1027-28). Christopher said that, from

the side and back, he had seen and heard a black man banging on Kimberly's door sometime the prior afternoon.(Tr1082-89). He later picked Orthell Wilson out of a photo line-up, although the man he saw wore a dark tank top and multi-colored shorts, while Orthell had last been seen that day in khaki shorts and a white t-shirt.(Tr1057-59,1090,1096,1310,1439). Brandon said that, while watching television around 5:15 p.m., he had heard shots and a woman scream.(Tr1112-13,1115).

After the police returned Kimber and his family home, they went to his rental properties on Palm to confirm with a renter that he had gone there to fix electrical problems. (Tr1263). While there, they began talking to Orthell, who said he was a friend of Kimber's and worked for him at the properties. (Tr1264-65). Since Orthell resembled the description of the man Christopher Harrington had seen outside Kimberly's apartment, they took him to the station, photographed and interrogated him and then returned to his apartment, there seizing some white t-shirts. (Tr1267-72,1310).

On August 25, Kimber met with his attorney, Doug Richards. (Tr1836).[3] The next afternoon, August 26, Kimber phoned Coleman, reading him a Notice of Intent to Remain Silent and Request for Counsel that he then faxed to Coleman at the University City station. (Tr1829-31,1837-43;ExhTT).[4]

That afternoon, St. Louis City Officer Burke, one of Kimberly's cousins, arrived at Kimber's house to "observe some illegally parked vehicles in the

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[2] These statements were not disclosed to the defense pre-trial.(Tr1189-90).
[3] This evidence came out in an offer of proof.

[4] This evidence also came out in the offer of proof.

grass."(Tr32,1305,1727). Because the cars were parked on the grass, Burke decided to write tickets on them.(Tr34-38,1729). As he wrote the tickets, Burke saw Kimber come out of the house.(Tr39,1732). Kimber had a phone, which Burke took from Kimber.(Tr39-41,43-44). He arrested Kimber for interfering with an officer, a municipal ordinance punishable by a fine, cuffing him behind his back and putting him on the grass, because Kimber knocked his ticket-book from his hands.(Tr44,46,1732). Tierra saw what happened and heard Burke yell, "you killed my cousin, how would you like me killing your family?"(Tr179-80,1779-80).

Burke transported Kimber to St. Louis City for booking, where they held him on an active warrant from Beverly Hills.(Tr45,54-56,1734-37). That warrant was for Albert, not Kimber, Edwards.(Exh.GG).

The next day, Coleman directed that Kimber be arrested.(Tr71). University City officers knew that St. Louis City was preparing to release Kimber so they sent detectives to get him.(Tr100-01,1159). Since they had no warrant, Coleman told them to ask Kimber to come with them voluntarily or, failing that, arrest him.(Tr1159). They arrested him at St. Louis City at 2:05p.m. and transported him to University City.(Tr105-06,1160-63). Kimber was placed in an interrogation room for about an hour before Detectives Siscel and Gage began their interrogation. (Tr1163,1165).

Siscel and Gage had interrogated Orthell earlier that day.(Tr1341,1470). Orthell took them to an abandoned building in St. Louis City and showed them where he had

hidden a gun, "the murder weapon."(Tr1342-45,1470-72).[5] When they returned to the station with Orthell, they began interrogating Kimber.(Tr1349). They told Kimber that they had Orthell in custody, had retrieved a gun and spoken with Orthell, and then paraded Orthell before Kimber.(Tr1353). When they told Kimber that they might need to bring his wife and children back to the station for questioning, he said he would tell them what they wanted to hear.(Tr1354-55,1409,1414).

Over continuing objection, Kimber stated that he had had problems with Kimberly, including an upcoming court date, and he spoke with someone named Michael, who approached him and said he could take care of the problem for $1600. (Tr1361-63). He recounted their ongoing discussions and said that, after Kimberly was killed, Michael approached him and asked to be paid, which he did.(Tr1364-73). Kimber also wrote this statement.(Tr1376-82;Exh.80). Kimber moved to suppress his statements but, after a hearing, the court refused.(LF36-39,64-70;Tr190).

Siscel and Gage talked to Orthell again the next day and thereafter re-interrogated Kimber.(Tr1389-90). Orthel had told them that Michael did not exist[6] and, upon so informing Kimber, Kimber gave another statement.(Tr1394-96). In the second statement, Kimber stated that Orthell demanded payment for his role in killing Kimberly.(Tr1398-1402).

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[5] Orthell did not testify. His statements were adduced through police, over objection. (Tr1344,1470-72).

[6] Counsel repeated the hearsay objection.

The state called Donnell Watson, who had lived with Orthell in Kimber's apartments and knew Hughie, Orthell's brother.(Tr1421-22,1424). He recalled that around August 21, 2000, Kimber went upstairs to Orthell's apartment.(Tr1425,1428-29). On August 22, Donnell and Orthell left work together, both wearing their uniform—khaki shorts and white t-shirt—and Orthell asked Donnell to take him to University City, saying he had some work to do.(Tr1435-36,1439). Donnell dropped Orthell off around 4:25 p.m.(Tr1437-38). Orthell returned home around 7:30 p.m. and Kimber came to the apartments that evening, around 8 p.m., went upstairs and Donnell heard them talk.(Tr1439-47).

The court denied Kimber's motion for a continuance based on the need to interview Robert Smith, who would rebut the state's evidence about Kimber's whereabouts the week of August 20, 2000.(LF387-93;Tr209-12).

Hughie, a drug dealer who is often mistaken for Orthell, was Kimber's maintenance man before Orthell.(Tr1601-07,1628). Hughie testified that Kimber fired him when he could not work after injuring himself by falling out of a tree while doing repairs at Kimber's home.(Tr1605). Hughie stated that he had done nothing to Kimber except repeatedly steal tools from him, which he then sold for crack cocaine.(Tr1607-08). Hughie stated that he saw a .38 revolver on a table in Orthell's bedroom in August, 2000, when he and Kimber were there.(Tr1612-14). Kimber told Orthell to put the gun away. (Tr1614). Over objection, Hughie said that sometime "way before" seeing this gun, Kimber had asked Hughie where he could get a throw-away gun, but nothing had come of that conversation.(Tr1616-24).

During jury selection, the state successfully objected, blocking counsel's voir dire on whether the jurors could consider life without parole if they knew Kimber was accused of killing the "mother of his child."(Tr343-46). In both phases, through evidence and argument, the state informed the jury that the victim was the mother of Kimber's child.(Tr944-47,972-73,984,991,1011,1881,1932,2034,2047-48).

The state struck peremptorily the three African-American jurors who remained in the jury-pool—Robinson, Evans and Burton—and the defense asserted those strikes violated Equal Protection, under *Batson v. Kentucky*, 476 U.S. 79 (1986).(Tr913-22). The court allowed the strikes.(Tr914,916,920).

Kimber testified in guilt phase (Tr1802-1880) but not in penalty phase. Counsel requested that the court give Instruction D, modeled on MAI-Cr3d 308.14, the no-adverse-inference instruction, which the court refused.(LF492;Tr1988-89).

Counsel requested that the jury be allowed to see the certified judgment in Orthell's case, showing that for shooting Kimberly Cantrell, he had received a life without parole sentence.(Tr1989;ExhIII). The court refused.(Tr1989).

The jury convicted Kimber of first degree murder, after asking during deliberations why Orthell didn't testify and if they could see his pre-trial statements. (Tr1922-23). They voted that Kimber be sentenced to death after deliberating over four hours.(Tr2052). The sole aggravator they found was that "the defendant hired Orthell Wilson and/or a person known only as Michael to murder Kimberly Cantrell."(LF494).

At the hearing on the new trial motion, Erica Edwards told the court that she spoke for her family and she did not want her father to be sentenced to death.(Tr2093-95;ExhJJJ). Erica, then 16, stated,

> I do not think I will ever forgive him for what he has done but, I do not want him to be executed. I believe everyone should die only according to when God is ready for them. My mother did not get a chance to see when God was ready for her and I think my father needs time to think about this. My mother would not have wanted my father to be executed…Seeing my father executed would not give me closure. It will only make my life complicated and more unhappy.

Tr2093-95;ExhJJJ). The court acknowledged Erica's statement but sentenced Kimber to death.(Tr2097).

This appeal follows.

POINTS RELIED ON

I. BATSON CHALLENGES IMPROPERLY DISALLOWED

The trial court clearly erred in denying the defense motion to disallow the state's peremptory challenges of Venirepersons #50—Ms. Evans, and #56—Mr. Burton, African-Americans, because the court's rulings denied them and Kimber equal protection and Kimber freedom from cruel and unusual punishment under U.S.Const.,Amends.8,14 and Mo.Const.,Art.I, §§2,21 in that defense counsel made a prima facie case of discrimination by the state and the state's explanations for its strikes of Evans and Burton were pretextual. The state's explanation for striking Ms. Evans—that she distrusts the system, the courts, and prosecutors because of the treatment of her relative—was pretextual since Veniremember Tincu was a similarly situated white person who the state did not move to strike. The state's statement that Tincu was not similarly situated because she was not dissatisfied with the criminal justice system's treatment of her relative was not supported by the record. The state's explanation for striking Mr. Burton—that he was a postal worker—was also pretextual since Mr. Burton's employment with the postal service is unrelated to this case and therefore the "postal worker" explanation is code for African-American. Further, the state's explanation that they strike postal workers because they are members of a bureaucracy is pretextual since they did not strike similarly situated white jurors who also work for bureaucracies—the City of Clayton and the federal government.

Batson v. Kentucky, 476 U.S. 79 (1986);

State v. Marlowe, 89 S.W.3d 464 (Mo.banc2002);

State v. Parker, 836 S.W.2d 930 (Mo.banc1992);

U.S. Const.,Amend.14;

Mo.Const.,Art.I,§§2,21.

II. VOIR DIRE UNREASONABLY RESTRICTED

The trial court abused its discretion in unduly restricting defense voir dire by precluding counsel from asking whether the jurors could seriously consider imposing a life without probation or parole sentence if the State proved that "Kimber Edwards and another killed his ex-wife, the mother of his child" because this ruling denied Kimber due process, a fair trial with a fair and impartial jury, reliable sentencing, and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that, by denying Kimber the ability to probe the jurors' views about this being the killing of "the mother of [Kimber's] child," Kimber could not explore a critical fact in the case and discover potential disqualifying bias. Since the state emphasized that Kimberly Cantrell was the mother of Kimber's child, Erica, throughout trial, Kimber suffered a real probability of injury.

Morgan v. Illinois, 504 U.S. 719 (1992);

State v. Clark, 981 S.W.2d 143 (Mo.banc1998);

State v. Granberry, 484 S.W.2d 295 (Mo.banc1972);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

III. KIMBER'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED

The trial court erred and clearly erred in overruling Kimber's motion to suppress statements and admitting those statements into evidence because these rulings denied Kimber due process, a fundamentally fair trial, the right to silence and non-incrimination and freedom from cruel and unusual punishment guaranteed by the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),1921 in that Kimber was a suspect in Kimberly's death and was subjected to a custodial interrogation in the early morning of August 24, 2000. The interrogation was highly coercive, since the officers brought Kimber's wife and three children to the station that night; separated Kimber from his wife and his children; took fingerprints, shoeprints, hair samples and photographs of his wife and instituted proceedings to place custody of his daughter Erica in DFS, removing her permanently from Kimber's custody that night. Kimber's statements were obtained because of the coercive environment and were thus involuntary, since the officers threatened to bring his wife and remaining children back to jail for more questioning unless he agreed to tell them what they wanted to hear. Kimber's statements were also involuntary because he invoked his right to counsel once he was a suspect in this case, after the initial custodial interrogation, but before he made any statements and did not initiate the contacts with police officers who ultimately obtained his statements.

Edwards v. Arizona, 471 U.S. 477 (1981);

Lynumn v. Illinois, 372 U.S. 528 (1963);

State v. Lyons, 951 S.W.2d 584 (Mo.banc1997);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),19,21.

IV. NON-TESTIFYING CO-DEFENDANT'S STATEMENTS ADMITTED

The trial court erred in admitting through Officers Whitley, Coleman, Gage and Siscel, the statements of Orthell Wilson, Kimber's non-testifying co-defendant who shot Kimberly Cantrell, and whose statements implicated Kimber and further erred in denying Kimber's request for instructions limiting the officers' testimony to explain their subsequent conduct and not for the truth of what Orthell told them because those rulings denied Kimber due process, the right to confront witnesses against him, a fundamentally fair trial and freedom from cruel and unusual punishment under the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that, while the state asserted that the officers' testimony was intended to show "what they did next" it was solely introduced to show that Orthell had confessed to killing Kimberly and had implicated Kimber; the jury asked about Orthell's statements during deliberations, and, since Orthell did not testify, Kimber was denied the right to confront him and challenge his statements implicating Kimber in the crime.

Bruton v. United States, 391 U.S. 123 (1968);

State v. Lee, 841 S.W.2d 648 (Mo.banc1992);

State v. Debler, 856 S.W.2d 641 (Mo.banc1993);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

V. REFUSAL TO GIVE NO-ADVERSE-INFERENCE INSTRUCTION

The trial court erred in refusing to give Instruction D, the no-adverse-inference instruction, patterned after MAI-Cr3d308.14, in penalty phase because this ruling denied Kimber due process, a fair trial, freedom from cruel and unusual punishment and his privilege against self-incrimination under U.S.Const., Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),19,21 in that, although Kimber testified in guilt phase, he did not testify in penalty phase and, when counsel requested that the court instruct the jury that it could not draw any adverse inference from Kimber's failure to testify, the court refused. The failure to give that instruction inescapably impressed on the jury's consciousness that Kimber had not testified and left it free to consider that fact in making its penalty phase decision.

State v. Mayes, 63 S.W.3d 615 (Mo.banc2002);

State v. Storey, 986 S.W.2d 462 (Mo.banc1999);

Carter v. Kentucky, 450 U.S. 288 (1981);

U.S. Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),19,21.

VI. INSUFFICIENT EVIDENCE SUPPORTS SOLE AGGRAVATOR

The trial court erred in submitting Instruction 17, accepting the jury's penalty phase verdict and sentencing Kimber to death because these rulings violated Kimber due process, a fair jury trial and freedom from cruel and unusual punishment under the U.S..Const.,Amends.5,6,8,14 and Mo.Const.,Art.I, §§10,18(a),21 in that the sole aggravator the jury found—whether Kimber hired Orthell Wilson and/or a person known only as Michael to murder Kimberly Cantrell—was not supported by sufficient evidence. Orthell's statements were not admitted for their truth, thus the sole evidence upon which the existence of the aggravator rested was Kimber's statements. Since the aggravator was the sole element of the charge in penalty phase, the state was required to prove it by evidence other than merely Kimber's statements.

Ring v. Arizona, 122 S.Ct. 2428 (2002);

Bullington v. Missouri, 451 U.S. 430 (1981);

State v. Summers, 362 S.W.2d 537 (Mo.1962);

U.S. Const.,Amends.5,6,8,18;

Mo.Const.,Art.I,§§10,18(a),21.

VII. COMMENTS ON FAILURE TO PLEAD GUILTY

The trial court erred and abused its discretion in overruling Kimber's objections to repeated statements about Kimber's failure to plead guilty to criminal non-support because those rulings denied Kimber's rights to due process, to be tried solely for the pending charge, a fair trial and freedom from cruel and unusual punishment under the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I, §§10,18(a),21 in that the comments encouraged the jury to convict Kimber of first degree murder based on his failure to plead guilty to another offense, and thus used his exercise of his constitutional rights in another case to suggest guilt in both cases.

State v. Hornbuckle, 769 S.W.2d 89 (Mo.banc1989);

State v. Trimble, 638 S.W.2d 726 (Mo.banc1982);

State v. Burnfin, 771 S.W.2d 908 (Mo.App.,W.D.1989);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

VIII. FAILURE TO DISCLOSE DEFENDANT'S STATEMENT

The trial court abused its discretion in denying the defense request for a mistrial when Detective Brady testified that Kimber told him "it's not his business. He had nothing to do with it" because this ruling denied Kimber due process, a fair trial, confrontation, effective assistance of counsel and freedom from cruel and unusual punishment under the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I, §§10,18(a),21 and violated Rule 25.03 in that the state failed to disclose this statement, despite discovery requests under Rule 25 and §565.005RSMo, and the state used the statement to bolster its case against Kimber and portray Kimber as uncaring and unremorseful about Kimberly's death.

State v. Johnston, 957 S.W.2d 734 (Mo.banc1997);

State v. Whitfield, 837 S.W.2d 503 (Mo.banc1992);

State v. Scott, 943 S.W.2d 730 (Mo.App.,W.D.1997);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21;

Rule 25.

IX. IMPROPER ARGUMENTS IN BOTH PHASES

The trial court plainly erred in not declaring a mistrial *sua sponte* when the prosecutor argued that:

IN VOIR DIRE

1. the State would have the burden of proving to your satisfaction unanimously;

2. this is a case in which there was a contract killing;

IN GUILT PHASE CLOSING

3. this child was denied the joy of having her mother seeing her go to high school prom;

4. they see this terrible sight, the tragedy Phyllis will never forget and that picture of your sister lifeless on the floor;

5. you know what, I don't think most people in here believe that Michael actually exists;

6. if a contract killing is not cool reflection then there is not cool reflection;

7. this is a correctional officer who deals with prisoners in the course of his profession, do you think that he's ever met a person yet who's told him they confessed to a murder to make it easier for his family to help himself out, to help his family for him to confess to the murder he had no involvement in;

8. And this business about Florida, he couldn't do any of the things he said because he was in Florida. Was anybody offended by that? Here's a guy who

hasn't paid child support taking trips to Florida. It's not just a trip, he's looking at a time share to buy into;

9. Penitentiaries in the state of Missouri are filled with people who have been found guilty beyond a reasonable doubt. It is not an impossible burden just because of this nonsense about Michael and we couldn't prove that he bought the checks;

<u>IN PENALTY PHASE CLOSING</u>

10. What's the one thing we haven't heard about that Kimber Edwards has expressed to anyone, remorse. Any remorse, any sadness about the killing of Kimberly Cantrell. And why haven't you heard about it? Because he hasn't obviously expressed it to anybody;

11. there is nothing worse than hiring somebody else to do your dirty work for you;

12. we would be bringing every witness in a criminal case through a back door in handcuffs because who would want to show up if they felt there was a chance that they'd be killed, and, if there was ever a case in which the death penalty was merited, it's a case in which a person has a criminal witness scheduled because the system will break down;

13. You don't have to do it, but if there was a case in which a person deserved it, based on their conduct, and whether they've had a very nice, comfortable existence up until now, well, you know, if you look at it, if you look at the comfort of his lifestyle up until now, it makes it worse; and

14. most fathers in their divorce cases don't enjoy child support, but you know they do it because it's the right thing to do and if they love their child, they really do it. This love of Erica, this child he wouldn't even support, I don't buy it. These arguments denied Kimber due process, a fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that they misstated the law, argued the case in voir dire, was victim impact in guilt phase, converted Sidel into an unsworn witness, referred to facts not in evidence, urged conviction based on uncharged conduct, commented on Kimber's failure to testify in penalty phase and converted mitigators into aggravators.

Donnelly v. DeChristoforo, 416 U.S. 637 (1974);

State v. Rhodes, 988 S.W.2d 521 (Mo.banc1999);

State v. Storey, 901 S.W.2d 886 (Mo.banc1995);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

X. RING/APPRENDI VIOLATION

The trial court erred in overruling Kimber's Motion to Quash the Information for Failure to Comply with *Apprendi v. New Jersey* and *Jones v. United States* and lacked jurisdiction to sentence Kimber to death because this ruling denied Kimber due process, notice of and to be tried and sentenced for the charged offense, a jury trial, and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,17,18(a),21and §565.030.4(1) in that Missouri's statutes authorize a death sentence only upon a finding of at least one statutory aggravating circumstance, facts that the state must prove to increase the punishment for first degree murder from life imprisonment without parole to death. Since this indictment failed to plead any aggravating circumstances it did not include any of the facts that would authorize enhancing the sentence to death and thus did not charge an offense that would authorize a sentence of death.

Ring v. Arizona, 122 S.Ct. 2428 (2002);

Apprendi v. Arizona, 530 U.S. 466 (2000);

Bullington v. Missouri, 451 U.S. 430 (1981);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

XI. CONTINUANCE DENIED

The trial court abused its discretion in denying Kimber's verified motion for a continuance based on his need to locate Robert Smith because this ruling denied Kimber due process, confrontation, effective assistance of counsel and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that Smith would have testified that Kimber neither entered the apartment building in which Orthell Wilson lived nor talked to him there the evening of August 22, 2000. This would have impeached and directly rebutted the testimony of state's witness Donnell Watson, through whom the state attempted to link Orthell and Kimber in a plot to kill Kimberly Cantrell.

State v. Taylor, 944 S.W.2d 925 (Mo.banc1997);

State v. Dodd, 10 S.W.3d 546 (Mo.App.,W.D.1999);

State v. Patton, 84 S.W.3d 554 (Mo.App.,S.D.2002);

U.S.Const.,Amends.5,6,8,14;

Mo.Const.,Art. I,§§10,18(a),21.

XII. DISPROPORTIONATE SENTENCE

The trial court erred in accepting the jury's death penalty verdict and in sentencing Kimber to death and this Court, in the exercise of its independent duty to review death sentences under §565.035 RSMo, should reduce Kimber's death sentence to life without probation or parole, because Missouri's death penalty scheme, both facially and as applied, violates the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that the evidence was insufficient to support the sole aggravating circumstance the jury found; the evidence, including the state's misconduct at every phase, from jury selection forward, shows that Kimber's sentence was imposed because of passion, prejudice and other arbitrary factors; this Court's refusal to engage in meaningful proportionality review, including refusing to consider all similar cases, violates due process and does not comply with §565.035RSMo; Kimberly's daughter, Erica, requested that Kimber not be sentenced to death, and the actual shooter, Orthell Wilson, was sentenced to life without parole, and Kimber's sentence is thus excessive and disproportionate. All of these factors result in the arbitrary and capricious imposition of the death penalty.

Gregg v. Georgia, 428 U.S. 153 (1978);

State v. Marlowe, 89 S.W.3d 464 (Mo.banc2002);

State v. Mayes, 63 S.W.3d 615 (Mo.banc2001);

U.S. Const.,Amends.5,6,8,14;

Mo.Const.,Art.I,§§10,18(a),21.

ARGUMENT

I. BATSON CHALLENGES IMPROPERLY DISALLOWED

The trial court clearly erred in denying the defense motion to disallow the state's peremptory challenges of Venirepersons #50—Ms. Evans, and #56—Mr. Burton, African-Americans, because the court's rulings denied them and Kimber equal protection and Kimber freedom from cruel and unusual punishment under the U.S.Const.,Amends.8,14 and Mo.Const.,Art.I,§§2,21 in that defense counsel made a prima facie case of discrimination by the state and the state's explanations for its strikes of Evans and Burton were pretextual. The state's explanation for striking Ms. Evans—that she distrusts the system, the courts, and prosecutors because of the treatment of her relative—was pretextual since Veniremember Tincu was a similarly situated white person who the state did not move to strike. The state's statement that Tincu was not similarly situated because she was not dissatisfied with the criminal justice system's treatment of her relative was not supported by the record. The state's explanation for striking Mr. Burton—that he was a postal worker—was also pretextual since Mr. Burton's employment with the postal service is unrelated to this case and therefore the "postal worker" explanation is code for African-American. Further, the state's explanation that they strike postal workers because they are members of a bureaucracy is pretextual since they did not strike similarly situated white jurors who also work for bureaucracies—the City of Clayton and the federal government.

When the spectre of racial discrimination in jury selection enters the courthouse, the very fiber of our constitutional system is threatened. The litigants are threatened and harmed by the risk that the prejudice motivating the discriminatory jury selection process will infect the entire proceedings. *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 628 (1991); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). The veniremembers are harmed by the denial of their right to participate in the system. *Powers v. Ohio*, 499 U.S. 400 (1991). And the community at large is harmed by the state's perpetuation of "invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994).

"Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. at 401. Allowing exclusion of jurors in the official forum of a courtroom compounds the insult inherent in judging a citizen by the color of his or her skin. *Edmonson v. Leesville Concrete Co.,* 500 U.S. at 628. The only legitimate interest a party can have in exercising a peremptory challenge is in securing a fair and impartial jury. *Id*. at 620; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 137. Nonetheless, challenges are exercised to preclude people of color from serving on juries solely because of their color. That occurred here when Sidel exercised peremptory challenges against Veniremembers Burton and Evans.

The trial court clearly erred in denying Kimber's motions to disallow Sidel's challenges of both veniremembers. The challenges denied equal protection to Kimber

and to Veniremembers Burton and Evans under the state and federal Constitutions. This Court must reverse and remand for a new trial.

If a party believes that a peremptory strike has been exercised in a racially-discriminatory[7] fashion, the stage is set for a *Batson* challenge. *Batson v. Kentucky*, 476 U.S. 79 (1986). In the first step of a *Batson* challenge, before the venire is excused and the jury is sworn, the party makes a prima facie case of discrimination by objecting to the moving party's peremptory strike as being exercised against, for example, an African-American. *Id.*,at 95; *State v. Parker*, 836 S.W.2d 930, 939 (Mo.banc 1992); *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo.banc 2002). At the second step, once the peremptory strike is alleged to be discriminatory, the burden shifts to the proponent to give a race-neutral explanation for the strike. *State v. Parker*, 836 S.W.2d at 939. Here, the explanation need not be persuasive, but must be race-neutral. *Purkett v. Elem,* 514 U.S. 765, 768 (1995). The race-neutral explanation must be clear, reasonably specific and related to the case at bar. *Batson v. Kentucky*, 476 U.S. at 98 n. 20. Unless a discriminatory intent is inherent in the explanation, it will be deemed race-neutral. *Hernandez v. New York*, 500 U.S. 352, 360 (1993). For the third step, the opponent must show that the proponent's explanation is pretextual. *State v. Parker*, 836 S.W.2d at 939. A pretext can be shown by the existence of one or more similarly situated white jurors who were not struck, *Id.*at 940; little or no logical relevance between the explanation and

[7]This process applies with equal force to gender or ethnic-based discrimination. *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

the case at bar, *Id*.; the lack of record support for the explanation, *State v. Butler*, 731 S.W.2d 265 (Mo.App.,W.D.1987); if the strike is based on the juror's "demeanor," that aspect of the juror's demeanor was not brought to the court's attention at the time it occurred, *State v. Metts*, 829 S.W.2d 585 (Mo.App.,E.D.1992), or the explanation is "implausible or fantastic" or "silly." *Purkett v. Elem*, 514 U.S. at 768.

Juror No.50—Laverne Evans

The State exercised a peremptory strike against Juror No.50—Laverne Evans. (Supp.L.F.16;Tr922). The defense objected to the strike based on *Batson* since Evans is an African-American female. (Tr914). Sidel, stipulating Evans is African-American, (Tr916), explained that he struck Evans because her niece was treated unfairly by the police; she believed her niece had been a victim of the system, and she distrusted the courts and prosecutors.(Tr914-915). The defense countered, showing that the state did not strike a similarly-situated white juror, No.62[8], although Tincu expressed distrust of the system because of a family member who had spent time in prison.(Tr.915). Sidel responded that the difference between the two was that the white juror felt "the system was too lenient on somebody" and not that the juror's nephew had been "persecuted by the police."(Tr915). The court overruled the objection and allowed the strike.(Tr916).

[8] While the parties referred to Juror No.62, the record clearly demonstrates that they meant Juror No.63, Tincu, since Tincu's responses are those the parties cited as the reasons for their discussions.

The record does not support Sidel's excuse. During general voir dire, Ms. Evans stated that her niece had been arrested and incarcerated for three months because her boyfriend had been involved in a drug-related assault on a police officer. (Tr775). While her niece was in jail, Evans and her family went to the jail "to encourage her." (Tr775). When Sidel asked if that experience made Evans emotional, she said it did not. (Tr776). Evans noted that her niece was traumatized by the experience and saw a psychologist a couple of times as a result. (Tr776). Nothing about Evans' experiences would prohibit her from giving either side a fair trial (Tr777). Evans further noted that she didn't know how her niece was treated in the jail, but merely saw her in a room at the jail, where the family encouraged the young woman. (Tr777).

Kristin Tincu, Juror No.63, a white juror, (Tr915), was not struck by the state. (Supp.LF20;Tr922). In general voir dire, Tincu stated that her nephew was in prison, serving a sentence for burglary. (Tr778). Tincu also had been a witness in a vehicular manslaughter case in which the defendant was convicted of two counts of manslaughter and served less time than her nephew. (Tr778). Tincu said, "I have a hard time understanding how the courtroom system works." (Tr778). The court then allowed the following exchange:

Mr. Sidel: So it sounds like you are upset that your nephew was treated too harshly?

Venireman Tincu: Right.

Mr. Sidel: Do you feel—were you in a car that was in the accident?

Venireman Tincu: No. I was a prosecution witness.

Mr. Sidel: Were you a party?

Venireman Tincu: No.

Mr. Sidel: You happened to be there and saw something?

Venireman Tincu: Right.

Mr. Sidel: You found in another case a person was treated too leniently?

Venireman Tincu: Yeah, for killing two people.

Mr. Sidel: Compared to your nephew?

Venireman Tincu: For home burglaries.

Mr. Sidel: Is there anything about the experience that you went through with your nephew and your sister, that's your nephew's mother?

Venireman Tincu: Right.

Mr. Sidel: That you feel would prohibit you from being fair to both sides in this case?

Venireman Tincu: I'm not a hundred percent sure. I think I can be. I just have a real problem with the situation with my nephew and seeing things, you know, he broke into a few houses, he did wrong, here's somebody who kills two people, he's out in seven years.

(Tr778-79).

Like Evans, however, Tincu stated that she would follow the court's instructions and she did not know of any mistreatment of her nephew by anyone in the county jail. (Tr780-81).

This record demonstrates that the trial court clearly erred in denying Kimber's *Batson* challenge to Evans' removal. Tincu is a similarly-situated white juror, who the state did not strike. Further, the state's attempted justification of the difference between Evans and Tincu is not supported by the record. The state's explanation is pretextual. The strike should have been disallowed.

This Court has recently recognized that "the existence of similarly situated white jurors who were not struck," while not dispositive, is a "factor so relevant in determining pretext that it is 'crucial.'" *State v. Marlowe*, 89 S.W.3d at 469. Both Evans and Tincu had relatives who had been incarcerated yet the State struck Evans, not Tincu. The State attempted to justify the difference by telling the court that Evans believed her niece had been treated unfairly by the police, had been a victim of the system and she thus distrusted the legal system.(Tr914-15). The State told the court that Tincu had not felt her nephew was ill-treated by the system but only believed the system had been too lenient on someone else.(Tr915). But, saying it doesn't make it so.

Evans' responses demonstrated only that her niece had been incarcerated because her boyfriend had been involved in a drug case. She affirmatively told Sidel that the experience had not made her emotional and she stated that nothing about the experience would prohibit her from giving either side a fair trial. Tincu, on the other hand, told Sidel that she had difficulty understanding the system because of her nephew's incarceration and his disparate sentencing. She specifically told Sidel that she was "upset" that her nephew was treated "too harshly" and was "not a hundred percent sure" that she could be fair to both sides. The record does not support Sidel's statements, but reflects that, of the

two, Tincu had more problems with the judicial system than Evans. Thus, as in *State v. Butler*, 731 S.W.2d at 271-72, where the record did not support the state's explanation for its strikes, Sidel's excuses reveal his discriminatory purpose.

This peremptory strike was discriminatory and Sidel's excuses were pretextual. The court clearly erred in overruling the objection to this strike.

Juror No.56—Ronald Burton

The State exercised a peremptory strike against Juror No.56—Ronald Burton. (Supp.L.F.18; Tr922). The defense objected to the strike based on *Batson* since Burton is an African-American male.(Tr916). The State responded that they had a policy of "never not strik[ing] a postal worker, particularly one who is very quiet and on that reason alone and my reason for that is, number one, postal workers—the post office is probably one of the biggest bureaucratic organizations in the country…."(Tr917). The State also responded that he had struck Juror No.55, a white person, who works for Federal Express, and Juror No.61, whose "spouse's occupation is a letter carrier."(Tr918).

The defense responded that the State's excuses were pretextual since, if the basis for striking the postal worker was because they work in a bureaucracy, white jurors who also were employed by bureaucracies were not struck.(Tr918-19). The defense pointed specifically to Juror No.11, Daniel Meehan, who works for the City of Clayton, (Supp.LF6), and Juror No.52, Thomas Schumacher, who was retired military.

(Supp.LF17;Tr919).[9] The State responded that many "lawyers use [postal service] employment as a reason to strike."(Tr919). The court overruled the defense's objection. (Tr920).

The State's excuse for striking Mr. Burton demonstrates the pretext because first, it failed to strike similarly situated white jurors and second, its rationale is unrelated to any facts or legal issues in this case. The State's rationale for the postal worker strike was that since postal workers are part of a large bureaucracy, they make bad state's jurors, and thus, the State's attorney's blanket policy was to strike all postal workers. However, were the State's strikes truly based on Mr. Burton's employment by a bureaucracy, the State presumably would also have struck Mr. Meehan and Mr. Schumacher, who work for city government and a federal governmental entity, both clearly bureaucracies.

The State tried to justify its actions by noting its strike of Juror No.55, who works for Federal Express, and Juror No.61, whose husband is a mail carrier.(Tr918). Juror No.55, Robert Piazza, the State "thinks" is a white male,(Tr918), and the State told the court his occupation is "similar, not necessarily similarly situated."(Tr918). Juror No.61, Catherine Williams, apparently is a white female whose husband is a letter carrier.(Supp.LF20). The State told the court that "I'm not going to get into other reasons, but her spouse's occupation is a letter carrier."(Tr918).

[9]The record actually reflects that Schumacher works for the National Archives, part of the federal government, also clearly a bureaucracy.(Supp.LF17).

As even the State acknowledged, neither Piazza nor Williams is truly "similarly situated." Piazza works for Federal Express, which, while entrusted with package delivery, lacks the governmental bureaucracy component that characterizes the Postal Service. Thus, the justification for the strike of Mr. Burton is lacking as to Piazza. Williams is not herself even a letter carrier. The jury list merely refers to her husband as a "letter carrier." (Supp.LF20). Thus, she is not personally involved in the bureaucratic landscape of the Postal Service and the record does not even establish that her spouse works there.

The record and the State's telling comment about Ms. Williams, also reveal other reasons for the State's strikes of these two jurors. During general voir dire, Ms. Williams asked to speak at the bench about the presumption of innocence issue. (Tr873). She stated "In 1980 my husband's aunt and uncle were murdered in bed. The people captured were tried and convicted and executed in the state of Louisiana. I've seen the devastation of despair on both sides for the victim and for the people that committed the crime." (Tr873). When asked if this experience would cause her not to afford Kimber the presumption of innocence, she responded that she would have to hear everything. (Tr874). Mr. Piazza's responses during death qualification revealed that he could consider a life without parole sentence, would not require the defense to present a list of mitigators as a reason to give life, and could seriously consider giving a life sentence even if the defense adduced no evidence in mitigation. (Tr588,592,598). The record thus reveals that the State may well have had an independent basis upon which it wished to

exercise peremptory strikes against Williams and Piazza, as the State itself indicated when responding to the *Batson* challenge.

As this Court recently held in *State v. Marlowe, supra,* a factor to be considered in determining whether the explanation offered for the strike is pretextual is the "degree of logical relevance between the proffered explanation and the case to be tried." *State v. Marlowe*, 89 S.W.3d at 469; citing *State v. Parker*, 836 S.W.2d at 940. The degree of relevance between the State's attempt to justify its strike of Mr. Burton and this case is non-existent. It is even more attenuated than the alleged connection between a juror's class-action involvement and the assault and weapons charges at issue in *Marlowe*. "Although a person's employment status, residence or marital status may, in an appropriate case, constitute legitimate race-neutral reasons for striking a potential juror, the concerns regarding those factors must somehow be related to the factual circumstances of the case and the qualifications of the juror to serve on that case." *People v. Jones*, 636 N.Y.S.2d 115, 117 (1996); accord, *People v. Smith*, 699 N.Y.S.2d 104, 105 (1999); *People v. Sims*, 618 N.E.2d 1083, 1087 (Ill.App.,1993); *Jones v. Rockford Memorial Hospital*, 736 N.E.2d 668, 671 (Ill.App.,2000); *People v. Randall*, 671 N.E.2d 60, 68 (Ill.App.,1996); *People v. Thurmond*, 741 N.E.2d 291, 297 (Ill.App.,2000); *United States v. Wynn*, 20 F.Supp.2d 7, 14-15 (D.D.C.1997). This kind of excuse "smacks of the kind of non-specific, subjective and racially suspect explanations which the Supreme Court hoped to obliterate via the *Batson* decision." *People v. Sims*, 618 N.E.2d at 1087.

This Court in *State v. Smulls*, 935 S.W.2d 9 (Mo.banc1996) found no error in the state's peremptory strike of a postal worker over defense objection. The *Smulls* decision

should not be deemed controlling since it is premised upon the flawed assumption that whether the State's excuses are "non- sensical" is irrelevant. *Id*. at 16. *Smulls* cites *Purkett v. Elem, supra,* for this proposition but fails to note that *Purkett* stated this principle with respect to the **second** not the third step of the *Batson* proceeding, as this Court's opinion seems to suggest. Although at the second step, the excuse can be non-sensical, at the third step, the excuse must be clear, reasonably specific and related to the case. *Batson v. Kentucky,* 476 U.S. at 98 n.20. At that point, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett v. Elem,* 514 U.S at 768; *State v. Marlowe*, 89 S.W.3d at 469.

That the State struck Mr. Burton because he was a postal worker, and thus worked in a bureaucracy is implausible and fantastic since the State failed to strike white jurors who worked for other governmental entities and since Mr. Burton's work and experience as a postal worker is unconnected to this case. Perhaps if this case involved allegations that someone had committed a murder and alleged that he had done it because of the stresses from multiple layers of rules at work, a juror's experience as a postal worker would be relevant and serve as the basis for a strike. Here, however, the State alleged Mr. Edwards had contracted to have his ex-wife killed. No connection between Mr. Burton's status as a postal worker and this case exists.

While deference is afforded the trial court's *Batson* rulings, this Court must not merely rubber-stamp those rulings. *Capitol Hill Hospital v. Baucom,* 697 A.2d 760, 766 n.20 (D.C.App.,1997). Instead, it must ensure that *Batson's* promise is fulfilled, that no juror be struck because of the color of her skin. Since Ms. Evans and Mr. Burton were

struck because they are African-Americans, and Sidel peremptorily challenged the only three remaining African-Americans on the venire,(Tr913), this Court must reverse and remand for a new trial, at which Kimber's rights to freedom from cruel and unusual punishment and the Equal Protection rights of both Kimber and the jurors are protected.

II. VOIR DIRE UNREASONABLY RESTRICTED

The trial court abused its discretion in unduly restricting defense voir dire by precluding counsel from asking whether the jurors could seriously consider imposing a life without probation or parole sentence if the State proved that "Kimber Edwards and another killed his ex-wife, the mother of his child" because this ruling denied Kimber due process, a fair trial with a fair and impartial jury, reliable sentencing, and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that, by denying Kimber the ability to probe the jurors' views about this being the killing of "the mother of [Kimber's] child," Kimber could not explore a critical fact in the case and discover potential disqualifying bias. Since the state emphasized that Kimberly Cantrell was the mother of Kimber's child, Erica, throughout trial, Kimber suffered a real probability of injury.

Kimber was charged with the contract killing of his ex-wife, Kimberly Cantrell. Kimber and Kimberly had a daughter, Erica. Erica was the second witness the state called in guilt phase, and her Aunt Phyllis, the state's first witness, testified about Erica's reactions the night she learned her mother had been killed. The state presented its case, through testimony and argument, as the killing of Kimberly, Erica's mother. The court, however, refused to allow voir dire on this critical fact. Kimber was prejudiced by this denial of his state and federal constitutional rights to due process, a fair trial with a fair and impartial jury, and freedom from cruel and unusual punishment. This Court must, therefore, reverse and remand for a new trial.

During voir dire, the state asked to approach the bench during the defense questioning, stating, "Judge, I object to going into specifics of aggravating circumstances. I don't think it's appropriate. May we approach the bench." (Tr343-44). At the bench, the following exchange occurred:

The Court: What exactly are you going into?

Ms. Monahan: Your Honor, I'll read the question exactly. It is my intention to ask—to state it is the State's theory that Kimber Edwards and another killed his ex-wife, the mother of his child. If the State proves its theory beyond a reasonable doubt, will you be able to seriously consider life without the possibility of parole.

Mr. Sidel: Well, that's getting into a specific of the case. What we are supposed to be dealing with are hypotheticals.

The Court: Let me say this: I think, first of all, I think that portion of the question, the mother of his child, is inappropriate in voir dire.

If you—I see nothing wrong with asking the other portion of the question, is that the State is going—has charged that, obviously, you've said charged the defendant with murder first degree for killing his ex-wife. I think you said that.

Mr. Sidel: I did say that.

The Court: I see no reason why you can't say that it's the death of the mother of his child. I don't know what—the rest of the question is inappropriate.

Ms. Monahan: If I may, the point is that the sensitive issues in this case, if we reach the sentencing phase, will be one of the State's aggravating circumstances and that is that it was a contract killing, which is what I'm trying to ask here and the other sensitive issue, the one necessarily submitted in a—in a statutory aggravator, but that it is the question I'm trying to ask in one question and not drag it out, but this is the question I believe falls under State versus Lewis Clark and that it is inappropriate not to allow the defendant to voir dire on certain highly sensitive issues that might prevent the jury from considering the punishment of life.

We need to know if there are people on this panel, it's a contract case, that's it and is that an automatic death, this is the mother of his child. I have to have a way to ask that.

The Court: Go ahead, Mr. Sidel.

Mr. Sidel: She's still defining what the aggravators are. The basic question is: Can they follow the instructions.

The Court: That's the ultimate issue, but I think she is entitled to ask, I think you are entitled to tell them the State has charged first degree murder, charged it as a contract killing. I think you can say that.

Ms. Monahan: Okay.

The Court: I still don't think it's appropriate to ask it about or at least tell the jury she was the mother of his child. That is a specific aggravator.

Mr. Sidel: That is not an aggravator, the mother of a child is not an aggravator.

The Court: So you are not going to submit that?

Ms. Monahan: It's not a statutory aggravator. I was arguing it falls under the sensitive issue situation that was covered in State versus Clark.

The Court: I'll sustain the objection to that. You may ask other questions, what we have covered regarding the fact it is a contract killing, but beyond that—

(Tr343-46). Because of the court's ruling, defense counsel did not again attempt to voir dire on how the jury might view the fact that Kimberly was the mother of Kimber's child, Erica. Counsel preserved the issue in the new trial motion.(LF526-27).

The state's guilt phase opening focused on Kimberly being the mother of Kimber's child, Erica, and particularly, Kimber's alleged failure to pay child support to Kimberly for Erica.(Tr944-47). Sidel told the jury, "They had a **daughter** Erica…" (Tr944) who, following the divorce, lived primarily with Kimberly, and Kimber was ordered to pay child support "for the support of the minor **child** Erica Edwards."(Tr945). He stated that, on Wednesday, August 23, "**her daughter** Erica … had tried to call **her mother** … to find out when **her mother** was going to pick her up…."(Tr946). He told them that "When Erica couldn't reach **her mother** at work she became a little bit concerned and she called her Aunt Phyllis…."(Tr947)(emphasis added).

The state's first witness was Phyllis Cantrell, Kimberly's sister and Erica's aunt. (Tr972-73). After recounting what had occurred on August 23rd, Sidel asked Phyllis to identify Exhibit 85, a photo of Kimberly and Erica at a family reunion.(Tr984).

The state's second witness was Erica Edwards. (Tr991). Yet again, Sidel asked Erica to identify Exhibit 85, the photo of Erica and her mother, Kimberly, at a family reunion. (Tr1011).

Detective Brady testified that, when he interrogated Kimber that first night, he "told [Kimber] I couldn't understand how he could just sit there and be so relaxed and have such a carefree attitude knowing that his ex-wife, the mother of his daughter, was killed."(Tr1190).

Sidel began his guilt phase closing by arguing, "This is a tragedy, an absolutely senseless tragedy motivated by this man's greed that he didn't want to pay the child support ordered by the court for the support of **his daughter Erica**, the daughter that they would—would have you believe that he loves so much that he doesn't even want to help pay for her child support… This (indicating) beautiful woman, Kimberly Cantrell, this beautiful woman and this (indicating) beautiful child, all over three hundred fifty-one dollars a month… This (indicating) child was denied the joy of having her mother seeing her while she is going to high school proms, the joy of having **her mother** help her plan her wedding, the joy of **her mother** seeing **her daughter** grow in with a family, this child will never have that and this is for three hundred and fifty-one dollars a month." (Tr1881)(emphasis added).

In penalty phase, Sidel re-called Phyllis, who testified that Erica's 16th birthday was the worst day since Kimberly's death and that Erica was "growing up, **her mom's** not here to see her celebrate her sixteenth birthday."(Tr1932). Phyllis also told the jury

that, "As much as I love Erica, I want to take care of Erica, I can never be **her mother** and I can never replace **her mother**."(Tr1932)(emphasis added).

In penalty phase closing, Sidel told the jury that Kimber "had all the time he could have called it off and could have come to his senses, what am I doing to **the mother of my daughter Erica**...."(Tr2034). In his final closing, Sidel first told the jury, "That is really unfair and how cynical to use Erica's name in this pitch to save his life. He kills **the child's mother** and then tells us, don't kill me, because you'll make her an orphan. I mean cynical to bring that poor child's name up in this case in this phase."(Tr2047). He went on to tell them, "What he did is he took this woman, this woman, whose picture you've already seen with her arm around **her daughter** at a family reunion…"(Tr2047). And, finally, he told them, "This love of Erica, this child he wouldn't even support, I don't buy it."(Tr2048).

Despite that Erica, Kimberly and Kimber's daughter, was a central figure in the state's case, a lightning rod of emotion for both phases of trial, the court refused to let the defense discover whether anyone on the venire would suffer from a disqualifying bias upon discovering that Kimber was alleged to have killed Erica's mother. The denial of this opportunity violated Kimber's state and federal constitutional rights.

The right to a fair and impartial jury encompasses the right to "an adequate voir dire to identify unqualified jurors." *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc1998), citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). If voir dire is inadequate, trial courts cannot fulfill their responsibility to remove jurors who will be unable impartially to follow and apply the instructions. *Id.*at729-30. Thus, this Court has repeatedly adhered to

the principle that "a liberal attitude is allowed in the examination of jurors." *State v. Clark*, 981 S.W.2d at 146, citing *State v. Granberry*, 484 S.W.2d 295, 299 (Mo.banc1972).

Because countless questions can be asked, the trial court has discretion to determine whether particular questions are appropriate. *State v. Clark*, 981 S.W.2d at 146. Here, however, the trial court prohibited any examination about the effect on the veniremembers of the critical fact that Kimber orchestrated the killing of the mother of his child. It abused its discretion.

Not every fact need be disclosed on voir dire, but "those critical facts—facts with substantial potential for disqualifying bias—must be divulged to the venire." *State v. Clark*, 981 S.W.2d at 147. In *Clark*, the critical fact was that one of the victims was three years old. This Court noted the sympathy that might be engendered because of the victim's age and recognized that the trial court's sweeping ruling had precluded the defense from discovering that bias.*Id*.

A similar bias would be engendered by the fact here hidden from the jury until it was sprung on them in the state's opening and then repeated throughout trial—that Kimber had allegedly had the mother of his child killed. As Sidel's closings in both phases reveal, this is a fact that distinguishes this case even from other contract killings—since the result leaves motherless, not someone to whom you have no emotional attachment, but your own child.

Further, similar to the situation in *Clark, supra,* Sidel repeatedly emphasized the relationships among Kimber, Kimberly and Erica—reminding the jury through evidence

and argument that Erica no longer had a mother to guide and protect her. Sidel chose to emphasize this critical fact, creating a real probability of injury because of the court's refusal to allow voir dire on that fact. One or more jurors may well have been unable to follow the court's instructions given that fact, yet he had ensured that defense counsel was precluded from discovering their views. *State v. Weiss*, 24 S.W.3d 198 (Mo.App.,W.D.2000).

As in *Clark*, this fact may well have had an enormous impact upon the result of the case. In *Clark*, for example, while the jury sentenced Mr. Clark to death on both counts when voir dire was precluded on this critical fact, *State v. Clark*, 981 S.W.2d at 145, upon re-trial, after voir dire on the critical fact, Mr. Clark was sentenced to life without parole and to twenty years. *State v. Clark*, 45 S.W.3d 501 (Mo.App.,E.D.2001).

This was not argument or facts presented in explicit detail, such that counsel's question could be deemed inappropriate. *State v. Clark* 981 S.W.2d at 146; citing *State v. Antwine*, 743 S.W.2d 51, 58 (Mo.banc1987). Counsel's question also was not an improper attempt to elicit a commitment from jurors. *State v. Clark*, 981 S.W.2d at 146; citing *State v. Jones*, 749 S.W.2d 356, 359 (Mo.banc1988). The trial court's ruling, allowing voir dire on the "contract killing" portion of counsel's question belies that excuse. Voir dire requires that some portion of the facts of the case be revealed or risk that, by insufficiently describing the facts, the right to an impartial jury be jeopardized. *State v. Clark*, 981 S.W.2d at 147; *State v. Antwine*, 743 S.W.2d at 58. Here, the defense was denied any opportunity to probe veniremembers' attitudes about this critical fact.

Because the trial court barred all inquiry into a critical fact—one the state repeatedly emphasized throughout trial—this Court must reverse and remand for a new trial.

III. KIMBER'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED

The trial court erred and clearly erred in overruling Kimber's motion to suppress statements and admitting those statements into evidence because these rulings denied Kimber due process, a fundamentally fair trial, right to silence and non-incrimination and freedom from cruel and unusual punishment guaranteed by the U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),19,21 in that Kimber was a suspect in Kimberly's death and was subjected to a custodial interrogation in the early morning of August 24, 2000. The interrogation was highly coercive, since the officers brought Kimber's wife and three children to the station that night; separated Kimber from his wife and his children; took fingerprints, shoeprints, hair samples and photographs of his wife and instituted proceedings to place custody of his daughter Erica in DFS, removing her permanently from Kimber's custody that night. Kimber's statements were obtained because of the coercive environment and were thus involuntary, since the officers threatened to bring his wife and remaining children back to jail for more questioning unless he agreed to tell them what they wanted to hear. Kimber's statements were also involuntary because he invoked his right to counsel once he was a suspect in this case, after the initial custodial interrogation, but before he made any statements and did not initiate the contacts with police officers who ultimately obtained his statements.

A critical component of the state's case was Kimber's statements to police that he had hired someone to kill his ex-wife, Kimberly. Without those statements, the state

would not have had a submissible case. It would only have had speculation, innuendo and hearsay. The jury heard and considered Kimber's statements, although they were involuntary because of police coercion and because Kimber had invoked his right to counsel and had not subsequently instigated contact with the police. The trial court erred in denying the defense offer of proof and refusing to re-consider his ruling on the motion to suppress, in initially denying the motion to suppress and in admitting evidence of Kimber's statements. Since these rulings violated Kimber's state and federal constitutional rights to due process and freedom from unreasonable searches and seizures and cruel and unusual punishment, this Court must reverse and remand for a new trial.

The State bears the burdens of production and non-persuasion to prove by a preponderance of the evidence that the motion to suppress should be overruled. *State v. Taber*, 73 S.W.3d 699, 703 (Mo.App.,W.D.2002); *State v. Weddle*, 18 S.W.3d 389, 391 (Mo.App.,E.D.2000). Review of the denial of a motion to suppress is limited to determining whether it is supported by substantial evidence. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo.banc1998); *State v. Lyons*, 951 S.W.2d 584, 588 (Mo.banc1997). The trial court's ruling will be reversed if it is clearly erroneous—if it creates the definite and firm belief a mistake has been made. *State v. Taber*, 73 S.W.3d at 703. The reviewing court is to review facts and the reasonable inferences arising therefrom in the light most favorable to the trial court's ruling, giving deference to the trial court's factual findings but reviewing application of those facts to the law *de novo*. *Id.* at 703; *State v. Carter*, 955 S.W.2d 548, 560 (Mo.banc1997); *State v. Weddle*, 18 S.W.3d at 391-92. Under these standards, it is clear Kimber's statements should have been suppressed.

The evidence adduced at the suppression hearing and at trial relevant to the motion to suppress was as follows: At 9:23 p.m. on August 23, 2000, two officers from University City arrived at Kimberly Cantrell's apartment.(Tr1018,1039). Three women—Phyllis Cantrell, Kimberly's sister, Mildred Edwards, Kimber's mother, and a friend—were outside and told them that Kimberly was inside, bleeding on the floor. (Tr1019,1039-40). Kimberly was dead, having been shot in the head.(Tr1040,1132).

University City's Sergeant Coleman arrived at the scene around 9:35-9:40 p.m. and, after talking to Phyllis and Mildred, supervised the investigation.(Tr60-61). Around 2 a.m., over four hours later, Coleman decided that he wanted to speak to Kimber and Kimber and Kimberly's daughter, Erica.(Tr61,1241). Coleman and approximately seven other officers, from University City and St. Louis City, went to Kimber's house. (Tr61,75,112,133,1242,1281).

Around 3 a.m., Kimber heard knocking, looked out the window and saw police cars in front of his house.(Tr1819). The officers all entered the house and followed Kimber out of the entrance hall up the stairs to the family's bedrooms on the second floor.(Tr76,1284-1285,1820-22). The officers then told Kimber that Kimberly was dead. (Tr1823). Coleman told the other officers to take all of Kimber's weapons.(Tr76-77,131). Coleman then asked Jada, Kimber's wife, to get the children, aged 11, 12 and 14, dressed and ordered that Kimber, Jada and the children be brought to the station for questioning.(Tr1285-86). Coleman told Kimber that he wanted to talk to him about who might have killed Kimberly. (Tr62). Jada and the children were taken to the station solely because of Coleman's order, not because they were suspects in the case.(Tr134).

Jada told the girls—Erica, Tierra and Brittney—to get dressed, which they did while police officers remained in their bedroom.(Tr152-54,997,1763). The entire family was then taken to the station, a 25-45 minute car-ride, the children in one police-car, Kimber and Jada in another.(Tr62,78,79,157-59,999,1243,1289-90,1764). The children didn't know what was going on and were separated from Kimber and Jada from that point on.(Tr156-58,1764).

When they arrived at the University City station, officers took Kimber to a small interrogation room; Jada to a secretary's office and the girls to the Deputy Juvenile Officer's Office.(Tr79-81,1244,1290-93). The family members remained separated. (Tr162).

The police left the three girls alone for several hours until an officer came and removed Erica.(Tr1766-67). That was the last time Tierra saw her sister, Erica.(Tr164). Tierra overheard the officer tell Erica her Aunt Phyllis was there and she then heard Erica screaming.(Tr165). Erica's screams could be heard "everywhere."(Tr135). A few minutes after Erica's screams, officers questioned Jada for 1-1 ½ hours separately from her other family members.(Tr136,1496). Coleman also ordered that she be photographed, fingerprinted, hairs collected, and shoeprints taken.(Tr86-89,1299-1301,1497).[10] Kimber was led out of his interrogation room to witness his wife being photographed.(Tr1825).

[10] Of those interviewed, Jada was the only person from whom evidence like shoeprints was taken.(Tr88,1300-03).

Later, an officer questioned the girls separately about Kimber and what he and the family had done in the last few weeks.(Tr1770-72). Only the officer and the child were present for the interrogation.(Tr81,1772).

Early on August 24, Coleman had another officer complete the paperwork to have Erica removed from Kimber's custody.(Tr82-83,1304). The police told the court that Kimber was a suspect in Kimberly's death.(Tr83,94-95,1504-05;ExhT).

Kimber was not given *Miranda* warnings that night.(Tr82). Ordered to remain in a 5x6' interrogation room containing a table, chairs, a surveillance camera, and accompanied by two officers for at least seven hours that day, (Tr1208-10,1296,1496,1252,1305), Kimber told officers that he had been out of town earlier that week, returning to St. Louis on the 22nd or 23rd, had taken his children to doctors' appointments and had gone to his rental property to do some electrical work.(Tr63,1210-15,1255-58). He stated that he had last seen Kimberly on August 10th.(Tr1194).

Officers began interrogating Kimber around 5 a.m. and continued for approximately 1½ hours.(Tr1188,1208,1223,1252). The officers then took Kimber's mugshot and fingerprints.(Tr1298,1825). At the end of the interrogation, Kimber told the officers that he was represented by counsel, Doug Richards.(Tr1298,1826).

In the early afternoon, the officers finally took Kimber, Jada, Tierra and Brittney home, again in separate cars.(Tr64,90,171-72). They then told him that Erica had been placed in DFS protective custody.(Tr1826-27). When they arrived home, Kimber discovered to what police had subjected his wife and children at the station.(Tr173,1829). The next day, August 25, Kimber met with his attorney, Doug Richards. (Tr1836). The

next afternoon, Kimber called Coleman and read him a Notice of Intent to Remain Silent and Request for Counsel that he then faxed to Coleman at the University City station.(Tr1829-31,1837-43;ExhTT).

That same afternoon, (August 26th) Officer Burke, a St. Louis City officer and one of Kimberly's cousins who had attended one of Coleman's meetings with Kimberly's family, arrived at Kimber's house to "observe some illegally parked vehicles in the grass."(Tr32,1305,1727). Because the cars were parked on the grass, Burke decided to write tickets.(Tr34-38,1729). While writing, Burke saw Kimber come out of the house. (Tr39,1732). Kimber had a phone and Burke took it from Kimber.(Tr39-41,43-44). He arrested Kimber for interfering with an officer, a municipal ordinance punishable by a fine, cuffed him behind his back and put him on the grass, because Kimber knocked his ticket book from Burke's hands.(Tr44,46,1732). Burke took Kimber to the St. Louis City station for booking where they held him on an active warrant from Beverly Hills, which, it was discovered that day, was for Albert, not Kimber, Edwards.(Tr45,48,54-56,1734-37).

Tierra recalled that on Saturday, she and Kimber were emptying the trash when Burke came out from behind one of the cars. When Kimber asked what was going on, Burke said that he had heard Kimber had killed his cousin and began cursing.(Tr176-77,1774-75). Kimber told Tierra to get a phone and she brought it to Kimber while Burke wrote tickets.(Tr177,1776,1794). Tierra saw Burke grab the phone from Kimber, throw it down, and then push Kimber to the ground, yelling, "you killed my cousin, how would you like me killing your family?"(Tr179-80,1779-80). She saw Burke arrest her

father.(Tr180,1779). Tierra interpreted Burke's comment about "killing your family" as threatening her.(Tr1799).

The next day, Coleman ordered Kimber's arrest.(Tr71). University City officers knew that St. Louis City was getting ready to release Kimber so Coleman told two detectives to get Kimber.(Tr100-101,1159). They had no warrant but they were to try to get Kimber to come with them voluntarily and, failing that, to arrest him.(Tr1159). They arrested him at St. Louis City at 2:05p.m. and transported him to University City.(Tr105-06,1160-63). Kimber was placed in the interrogation room for about an hour before being interrogated by Detectives Siscel and Gage.(Tr1163,1165). When Kimber arrived at the University City station that day, he told the officers that he had invoked his rights to remain silent and to counsel.(Tr1843). By doing so, he informed them that he did not wish to speak except through his attorney.(Tr1843).

The officers told Kimber that they had Orthell Wilson, had spoken to him and had his gun.(Tr1353). They also paraded Orthell in front of Kimber and showed him the gun. (Tr1353). They then told Kimber that they would bring his family—wife and children—back to the station for interrogation. (Tr120,146,1409,1414,1510). Kimber succumbed, saying he would tell them what they wanted to hear if they left his family alone. (Tr120,148,1354,1510). The police agreed, although they actually went to find Jada again that day, (Tr1312,1505-06,1520), they gave the *Miranda* warnings, and elicited statements from Kimber.(Tr121,1361-1403). At trial, the defense lodged continuing objections to the admission of those statements, which the court overruled.(Tr1358,1392).

The defense preserved the challenge to the court's actions in the new trial motion. (LF550-51).

These facts demonstrate that Kimber's statements were involuntary. First, they were obtained by coercion, specifically by threats against Kimber's family, and second, Kimber invoked his rights to remain silent and to counsel following the initial custodial interrogation and again when he was taken into custody that Sunday before police ultimately obtained his statements. As to the second issue, a preliminary procedural question must be resolved.

Kimber testified during guilt phase. The defense proposed to present evidence that, after having invoked his right to counsel on August 24, Kimber faxed an additional invocation of that right to Coleman, spoke to him by phone, and later, when taken into custody, informed the officers of that invocation of rights, stating his unwillingness to speak, except through counsel.(Tr1843). Nonetheless, the officers elected to question him without counsel's presence.(Tr1831).

The court initially stated that the fax and telephone communication to the police was "certainly an issue they are entitled to litigate."(Tr1832). The court thereafter, however, sustained the state's objection and confined the defense to making an offer of proof on the issue.(Tr1833-34). In the offer of proof, Kimber testified that he had telephoned Coleman, read him the invocation of rights and then had faxed it to him. (Tr1837-38). The exhibit presented to the court contained the fax cover sheet, indicating the number to which the documents were faxed, the document itself, and the fax confirmation sheet.(ExhTT;Tr1837-41). Kimber further testified that he again invoked

his rights to counsel and silence when he was returned to University City that Sunday afternoon.(Tr1843).

At the close of the offer of proof, the court first stated that he believed the invocation of rights went to whether Kimber's statements were voluntary and he would permit use of the exhibits.(Tr1849). The defense then asked that the court re-open the motion to suppress in light of the evidence "that has come in during this trial and during the offer of proof."(Tr1849). The court refused, saying the evidence was available at the time of the suppression hearing and, even with the new evidence, the evidence remained that Kimber signed *Miranda* waivers on Sunday.(Tr1850).

The trial court's first instinct was correct. The faxed and telephoned-in invocation of rights and Kimber's reiteration of that invocation were relevant to the voluntariness issue. This evidence should have been considered. The trial court erred in refusing to re-visit the suppression issue.

Apparently the court believed that all evidence dealing with suppression must be presented at the time of the suppression hearing. Yet, a ruling on a motion to suppress is interlocutory and thus subject to change through trial. *State v. Burge*, 39 S.W.3d 497, 499 (Mo.App.,S.D.2000); *State v. Cardona-Rivera*, 975 S.W.2d 200, 203 (Mo.App.,S.D.1998). In deciding admissibility of statements challenged by suppression motions the trial court bases its decision on evidence from the suppression hearing and evidence received at trial. *State v. Finster*, 985 S.W.2d 881, 887 (Mo.App.,S.D.1999). The trial court's failure to consider Kimber's additional evidence from the offer of proof

was erroneous, especially since it would have provided an additional basis for suppressing the statements.

COERCION USED TO OBTAIN STATEMENTS

Kimber's statements were obtained by threats against his family. They were involuntary and should have been suppressed.

Statements are given voluntarily if, under the totality of the circumstances, they are found to be the product of an essentially free and unconstrained choice by the maker. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Statements extracted or induced by threats or promises are involuntary. *Hutto v. Ross*, 429 U.S. 28, 30 (1976); *United States v. Ponce Munoz*, 150 F.Supp.2d 1125, 1135 (D.Kan.2001). Incriminating statements that the state obtains through acts, threats, or promises and that permit the defendant's will to be overborne will be deemed coerced confessions and the Fifth Amendment will be found to have been violated. *Griffin v. Strong*, 983 F.2d 1540, 1543 (10thCir.1993). Coercion is not limited to physical threats but may also involve psychological threats. *United States v. Ponce Munoz*, 150 F.Supp.2d at 1135; *United States v. Finch*, 998 F.2d 349, 356 (6thCir.1993).

Unfounded threats to arrest members of the suspect's family may render his statement involuntary. *United States v. Ponce Munoz*, 150 F.Supp.2d at 1135; *Rogers v. Richmond*, 365 U.S. 534 (1961); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). Express threats to take a suspect's children away if he fails to cooperate have been held to be so coercive as to render resulting statements involuntary. *See Id.*,at 534; *United States v. Prince*, 157 F.Supp.2d 316, 327 (D.Del.2001). Even if the threats are not direct but are

more subtle in nature, they may have the same purpose and effect as direct threats and will render the statements involuntary. *United States v. Tingle*, 658 F.2d 1332, 1336-37 (9thCir.1981).

The police actions here, threatening Kimber's wife and children, were coercive, rendering his statements involuntary. The coercion began when at least eight officers arrived, unannounced, at Kimber's home in the middle of the night.(Tr1819). The officers did not remain outside and explain their business. No. They **all** entered Kimber's home and immediately went upstairs to the bedroom area, where they informed him that he, his wife and his children must accompany them to the police station. (Tr76,1284-85,1820-22,1285-86). The police had no reason to suspect Jada or the children, yet they too were brought to the station and police officers even remained in the children's bedroom while they dressed.(Tr134,152-54,997,1763). The family was separated on the ride to the police station, with Kimber separated from his three young daughters.(Tr62,78,79,157-59,999,1243,1289-90,1764).

At the police station, Kimber remained separated from his family.(Tr162). During the seven hours they remained at the station, Kimber was only allowed to see his wife once—while police photographed her like a suspect.(Tr1825). Coleman denied having heard Erica screaming while he interrogated Kimber, (Tr1261), but another officer who was also on that floor, testified that her screams could be heard "everywhere."(Tr135).

When Kimber was finally allowed to leave the station, he was reunited with only part of his family—since the state had taken Erica from him that night.(Tr1826-27). When they arrived home, Kimber's family told him what had happened to them at the

station.(Tr173,1829). He discovered that the police had fingerprinted, photographed, and tested the hair and shoeprints of his wife.(Tr86-89,1299-1301,1497). He discovered that his daughters were separated from his wife, were left alone in an office for several hours, and then were questioned separately.(Tr1766-67,1770-71).

That Saturday, another officer, Officer Burke, arrived at Kimber's house, purportedly to write parking tickets on cars parked on the grass.(Tr32,1305,1727). Kimber's young daughter, Tierra, recalled that Burke yelled at Kimber, "you killed my cousin, how would you like me killing your family?"(Tr179-80,1779-80). Tierra took this as a threat to her personal safety.(Tr1799).

When Kimber was returned to the University City station that Sunday, before the officers *Mirandized* him, they told him that they would be bringing his family—his wife and the children who remained with him—back to the station for questioning. (Tr120,146,1409,1414,1510). Kimber ultimately told the officers that he would tell them what they wanted to hear if they would leave his family alone.(Tr120,148,1354,1510). Only then did Kimber make statements to the police.

Kimber's statements were obtained through the psychological pressures of threats to bring his wife and young daughters back to the station for further questioning and investigation. The police deliberately preyed upon his familial instincts to produce fear in him that his family would suffer if he did not give police exactly what they wanted. *See United States v. Tingle*, 658 F.2d at 1336. After all, the police had hauled his young daughters, who presumably had no experience with police stations or interrogations, out of their house in the middle of the night; had separated them from their parents; had

permanently removed one of them from his custody that night; had taken samples from his wife, all the while protesting that none of them were suspects, and had kept the family isolated, and at the station for over seven hours. To suggest that these children would not have felt threatened and scared by what occurred that night, and that, by implication, Kimber's paternal instincts would not have been affected ignores reality. Further, to suggest that Kimber's statements were not coerced, motivated by his concerns for his family's safety, ignores his statements to the police at the time.

AUGUST 27TH INVOCATION OF RIGHTS

It is undisputed that when Kimber was brought to the University City station on Sunday, August 27, he told the University City officers that he had invoked his rights to counsel and silence, presumably referring to his faxed and phoned communications with Coleman.(Tr1843). He thus informed them that he would not speak, except through his attorney.(Tr1843). The officers who interrogated him testified that, after he had been in their custody for over three hours, he ultimately signed *Miranda* waivers.(Tr 116,1354).

The trial court refused to re-open the evidence on the motion to suppress based on this evidence, which it received in an offer of proof.(Tr1850). The court based its ruling on two factors—first, that the evidence had been available at the time of the original suppression hearing and second, that Kimber had signed the *Miranda* forms.(Tr1850). This ruling is erroneous as it is based upon a misunderstanding of the applicable law. That Kimber ultimately signed the *Miranda* forms does not resolve the suppression issue since he had already invoked his right to counsel.

This case is squarely controlled by *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 471 U.S. 477 (1981). In *Edwards*, the defendant was arrested and informed of his rights, as required by *Miranda*. He stated that he understood his rights and was willing to be questioned. *Id.*at 478. He first denied involvement in the offenses and made a statement presenting an alibi defense. *Id.*at 479. After briefly speaking to a county attorney, he stated that he wanted an attorney before making a deal. *Id*. The officer stopped questioning him at that point. The next morning, however, two other officers came to the jail to see the defendant. *Id*. Although he stated that he did not wish to talk, he was forced to meet with them. *Id*. The officers again informed him of his *Miranda* rights, the defendant agreed to talk and then implicated himself in the crime. *Id.*

The Court noted that an accused may validly waive his rights—to counsel and silence—and respond to interrogation after being advised of his *Miranda* rights but, when he requests counsel, additional safeguards must be implemented. *Id*. at 484. The Court held that if an accused invokes his right to counsel, a valid waiver of that right can't be established by showing merely that he has responded to police-initiated custodial interrogation, even if he has been advised of his rights. *Id*. at 484. Once an accused has invoked his right to counsel, the state may not subject him to further interrogation in counsel's absence "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id*. at 484-85. This Court has repeatedly applied that rule of law. *See e.g., State v. Lyons*, 951 S.W.2d 584, 589 (Mo.banc1997).

No evidence contradicts Kimber's statement that he again asserted his right to counsel when he was brought to University City that Sunday. Further, tellingly, there is

no evidence that Kimber then initiated communications with the police. Rather, the record is clear that the authorities ignored his assertions of rights and continued to question him, ultimately obtaining his statements. The state thus did not meet its burden of production and non-persuasion. *State v. Taber*, 73 S.W.3d at 703.

As in *Edwards*, merely because Kimber later was *Mirandized* does not cure the evil caused by ignoring his assertions of rights. *Edwards v. Arizona*, 451 U.S. at 484. Even if Kimber asserted his rights at the outset of that interrogation, well before the state chose to read him the *Miranda* warnings, it was sufficient to invoke his rights under *Miranda* and *Edwards*. After all, "It would make little sense to require a defendant already in custody to wait until the onset of questioning or the recitation of her *Miranda* rights before being permitted to invoke her right to counsel." *State v. Torres*, 412 S.E.2d 20, 26 (N.C.1992); *United States v. Kelsey*, 951 F.2d 1196, 1198-99 (10th Cir.1991); *Alston v. Redman*, 34 F.3d 1237, 1248-49 (3rd Cir.1994).

The trial court erred in finding that giving the *Miranda* warnings cures all evils. Because Kimber had asserted and had not waived his right to counsel, the state was prohibited from approaching him in an attempt to obtain a statement. That the state ultimately gave the warnings is not the remedy. The state's actions inevitably lead to suppression of Kimber's statements.

AUGUST 26TH INVOCATION OF RIGHTS

Kimber's statements must also be suppressed because he invoked his right to counsel by fax and phone on Saturday, August 26, 2000. When he did so, he was a suspect, had been subjected to custodial interrogation without the benefit of *Miranda*

warnings, and the authorities were continuing to exert the same pressures upon him that they had used when he was first taken into custody. His invocation of rights should have precluded the state from approaching him and obtaining a statement. At the very least, that Kimber invoked his rights on Saturday supports that he again invoked his rights on Sunday, when the University City police again sought to obtain statements from him.

For the August 26th invocation to have effect, Kimber must have been a suspect and subjected to custodial interrogation. Sidel acknowledged in closing that Kimber was a suspect when he was brought in on August 24th.(Tr1886). That was why the police brought him, his wife and his three little girls the 25-45 minutes down to the station at 3 a.m.(Tr1886-87). That was why, early that morning, the police began filling out the paperwork to have Erica removed from Kimber's custody.(Tr82-83,1304). They told the court that Erica should be placed with DFS, in protective custody, because her father was a suspect in her mother's death.(Tr83,94-95,1504-05;ExhT). The state's actions speak louder than words. They considered Kimber a suspect and they acted in conformity with that belief.

Despite the state's protestations that Kimber was not in custody when he was brought into the station on August 24th, he was clearly in custody that morning because he was not free to go. To determine if a suspect is in custody, the totality of the circumstances must be reviewed. *Stansbury v. California*, 511 U.S. 318, 322 (1994); *United States v. LeBrun*, 306 F.3d 545, 551 (8thCir.2002). Being "in custody" for *Miranda* purposes means that there is a formal arrest or the person's freedom of movement has been restrained in any significant way. *Stansbury*, 511 U.S. at 322; *United*

States v. LeBrun, 306 F.3d at 551; *United States v. Wolk*, 2001 WL 1863567 at 6 (E.D.Mo., Aug. 16, 2001); *State v. Werner*, 9 S.W.3d 590, 594 (Mo.banc2000). The only relevant inquiry is whether a reasonable person in the suspect's position would have understood that he was in custody. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

Approximately eight officers arrived at Kimber's home at 3 a.m. and, upon entering, followed him upstairs to the family's bedrooms. Once there, the officers told Kimber that they wanted him, his wife and his children to accompany them to the station, a 25-45 minute ride away. They placed him and his family in separate cars and took them to the station. Once at the station, they again separated the family and placed Kimber in a small interrogation room, where, except for bathroom breaks, he remained until early afternoon, at least seven hours later. The door to that interrogation room was closed.(Tr1248). In the approximately 5x6' room, which contained a table, chairs and surveillance cameras, were Kimber and two officers.(Tr1210,1496). Throughout the interrogation process, until the officers finally took Kimber and his family back to their home, police did not let Kimber see his family members or be present during his minor daughters' questioning.

These facts would lead a reasonable person in Kimber's position to believe that he was **not** free to leave. *See State v. Werner*, 9 S.W.3d at 595. Kimber did not initiate contact with the authorities. They arrived, unannounced, at his home in the middle of the night, despite knowing of Kimberly's death five hours earlier. He was taken to the station by police car and thus had no way to transport himself and his family home—he was at the mercy of the police. He was separated from his family and was questioned by

two officers in a small office that contained surveillance equipment. The police began their strategy of exerting pressure on him by threatening his family—that first night bringing Kimber out to watch the police obtain fingerprints and mugshots of his wife. Under the totality of the circumstances, a reasonable person would not have thought he was free to leave. Kimber was in custody.

The final question is whether Kimber was subject to interrogation on the night of August 24th. Two officers testified that they questioned Kimber about his actions that week and whether he knew who might have killed Kimberly.(Tr1188-94,1252,1255-58). This was an interrogation. Its purpose was to obtain information (hopefully, incriminating) from Kimber. And, although the state obtained no such statements, they repeatedly referred to his allegedly "nonchalant" attitude as evincing his complicity in Kimberly's death.(Tr1190).

Kimber invoked his right to counsel once he was clearly a suspect and had been subjected to custodial interrogation. Under *Edwards*, the state was prohibited from approaching him without counsel's presence on Sunday, August 27th. The language of *Edwards* is clear—one who has indicated that he wishes to deal with the police only through counsel may not again be interrogated without counsel unless he initiates the communication. *Edwards*, 451 U.S. at 484-85. Since Kimber did not initiate the contact that day, and in fact re-invoked his right to counsel, his statements should have been suppressed as involuntary.

Several courts have held that an attempt to pre-emptively invoke the rights to counsel and silence will not be deemed effective if the suspect is not still in custody when

he invokes counsel prior to the second interrogation. *Alston v. Redman*, 34 F.3d 1237, 1245 (3rdCir.1994); *United States v. Barlow*, 41 F.3d 935, 945-46 (5thCir.1994); *Dunkins v. Thigpen*, 854 F.2d 394, 397 (11thCir.1988); *United States v. Hines*, 963 F.2d 255, 257 (9thCir.1992). The 8th Circuit has also recognized that some circumstances, such as a break in custody, might cause the *Edwards* rule to be inapplicable. *Holman v. Kemna*, 212 F.3d 413, 419 (8thCir.2000). That court did not, however, categorically rule out the applicability of *Edwards*. The Supreme Court in *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991), expressed in dicta that it did not necessarily follow that it "will allow [the *Miranda* right to counsel] to be asserted initially outside the context of custodial interrogation…." As one court has stated what appears to be the 8th Circuit's position, "if, after invoking one's Fifth Amendment right to counsel, a suspect is released from custody, then the concerns that prompted the *Miranda-Edwards* prophylactic rule are sufficiently minimized such that any violation of the Fifth Amendment right to counsel allegedly founded upon those prior request[s] for counsel simply dissolves." *Comm. v. Wyatt*, 688 A.2d 710, 713 (Pa.Super.1997).

The question is whether, under the unique circumstances of this case, the *Miranda-Edwards* rule should apply. It should. While Kimber was not "in custody," the pressures that accompany custodial interrogation remained in effect. Specifically, it was only upon his release from custody that he discovered the full extent of the threats against his family, as they recounted what had occurred at the station that morning. Further, on Saturday, Officer Burke, after having attended one of Coleman's meetings, went to Kimber's house, and according to Tierra, threatened his family with death. That Kimber

was physically outside of the station did not eliminate the pressures and controls that the police placed upon him. The *Miranda-Edwards* rule should apply, given the unique facts of this case.

The trial court erred in denying Kimber's motion to suppress statements. They were involuntary because of police coercion and because Kimber invoked his right to counsel and the police approached him and obtained statements from him without counsel's presence. This Court must reverse and remand for a new trial.

IV. NON-TESTIFYING CO-DEFENDANT'S STATEMENTS ADMITTED

The trial court erred in admitting, over objection, through Officers Whitley, Coleman, Gage and Siscel, the statements of Orthell Wilson, Kimber's non-testifying co-defendant who actually shot Kimberly Cantrell and whose statements implicated Kimber and further erred in denying Kimber's request for instructions limiting the officers' testimony to explain their subsequent conduct and not for the truth of what Orthell told them because those rulings denied Kimber due process, the right to confront witnesses against him, a fundamentally fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that, while the state asserted that the officers' testimony was intended to show "what they did next" it was solely introduced to show that Orthell had confessed to killing Kimberly and had implicated Kimber and, since Orthell did not testify, Kimber was denied the right to confront him and challenge his statements implicating Kimber in the crime.

The State rested its case against Kimber on two things—Kimber's statements[11] and Orthell Wilson's statements implicating Kimber. Orthell Wilson did not testify. Or did he? While he didn't take the stand and thus wasn't subject to confrontation and cross-examination, when the State's witnesses, Officers Whitley, Coleman, Gage and Siscel, testified about their actions, Orthell's statements came out of their mouths. The State's attempt to clothe this Sixth Amendment violation as an exception to the hearsay

rule—to explain the officers' subsequent conduct—must be seen for the sham that it is. The trial court's refusal to give a limiting instruction for considering this testimony compounded the error. This Court must reverse and remand for a new trial.

Sergeant Coleman directed the investigation of this case.(Tr58-59). After his first interrogation of Kimber, he and two other officers went to Kimber's rental properties to ascertain whether Kimber had been there on August 22 to repair the power as he had claimed.(Tr1263). While there, they spoke to Orthell.(Tr1265).[12] Coleman testified that Orthell went to the station where they interrogated him.(Tr1268). The next day, they arrested Orthell for Kimberly's murder, re-interrogated him, and then returned to Kimber's rental properties where they seized some of Orthell's clothing.(Tr1274). After they arrested Orthell, they interrogated Donnell Watson, and then went to the intersection of Olive and Midland, some 200-300 yards from Kimberly's house, and took photographs there.(Tr1278-79).

Another officer, Detective Whitley, testified that when they arrested Orthell, they seized from him $101 in cash.(Tr1061-65).[13] Detective Siscel testified that he and

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[11]See Point III.

[12] The defense objected to Coleman's testimony as hearsay denying Kimber's constitutional confrontation rights and requested a limiting instruction so that the jury would consider Coleman's testimony only as explaining his actions, not for its truth. (Tr1265-66). The court denied both requests.(Tr1265-66).

[13] The defense objected to this testimony since, to be relevant, it had to be based on hearsay—Orthell's statements to police that he had received the money from Kimber.

Detective Gage had talked to Orthell and thereafter they retrieved a gun from an abandoned house in St. Louis City.(Tr1344). He testified, over objection, that they went to the house because "Mr. Wilson told us that that's where he hid the murder weapon." (Tr1344).[14] He then reiterated, "Mr. Wilson told us he hid the murder weapon in that vacant building." (Tr1344-45). Gage also testified that he and Siscel were told to go to a certain building to retrieve a handgun, which "We found [] on the direction of Orthel Wilson." (Tr1470-76).[15]

(Tr1061-64). The court overruled the objection and denied counsel's request for a limiting instruction.(Tr1064). Sidel said that he would not argue that Orthell got the money from Kimber, yet did not state how else the evidence would be relevant.(Tr1064). Sidel also adduced testimony from Donna Knight, who examined the money for prints. (Tr1531-45). Knight could not lift prints, and, when counsel objected to her testimony as irrelevant, since it had no connection to Kimber, Sidel said, "That's true. She was not able to lift any prints. It doesn't implicate your client, it's just showing she attempted to find prints."(Tr1546).

[14] The defense objected to Siscel's testimony and requested a limiting instruction, which the court denied.(Tr1344).

[15] Distinct from the other instances related here, although the court overruled the defense objection, Sidel prefaced one of his questions to the witness by stating that he wasn't offering "the truth of what you were told" but just to explain his conduct.(Tr1473). That

Siscel later testified that he had interrogated Kimber again after having spoken with Orthell.(Tr1393). In response to the defense's objection, Sidel first proposed to ask Siscel "what did you tell Kimber Edwards, his response would be we told him that Orthel Wilson told us there is no Michael."(Tr1395). In response to a hearsay objection, Sidel stated, "I'm not offering it for the truth. I think it explains the change in the position. If you don't feel comfortable, I'll simply say, did you have a conversation with Kimber concerning the discussion you had with Orthel Wilson and what did Kimber say in response to that?"(Tr1395). Defense counsel repeatedly objected, noting that the jury would take this to mean that Orthell Wilson had told the police something inconsistent with Kimber's statement that prompted the further discussions.(Tr1395-96). Counsel noted that, "By inference the response is a reply to what Kimber Edwards was told Orthel Wilson had said."(Tr1396). Sidel responded, "There is no other explanation why the police would even be having a second conversation or why he would change his story, albeit not significantly…"(Tr1396). The court allowed Sidel to question the officer about Kimber's responses to Orthell's statements to him.

The state's guilt phase opening was consistent with this evidence. Sidel told the jury that Orthell Wilson "speaks with the police and he leads the police to a location directly across the street from 2101 Palm, … and they find hidden in a bag a pistol." (Tr951-52). He then stated, "When they bring [Kimber] back to the interview room they

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statement came, however, at the beginning of his examination and Gage's statements about what Orthell had told them came substantially later in the examination.

parade Orthel Wilson in front of him and also show him the gun and tell him at that point that they know he was lying in saying he had no knowledge of the murder because they told him, here's Orthel, here he is and here's the gun."(Tr952-53). Sidel concluded, "The police go back and speak to Orthel again and after their second conversation with Kimber Edwards…they say, hey, we spoke to Orthel and he says there is no Michael."(Tr955).

The Confrontation Clauses of the state and federal constitutions guarantee criminal defendants the right to cross-examine adverse witnesses. *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965). Admitting hearsay evidence against a defendant violates his right to confront and cross-examine witnesses. *Bruton v. United States*, 391 U.S. 123, 135-37 (1968); *State v. Debler*, 856 S.W.2d 641, 648 (Mo.banc1993). Especially when the evidence against the defendant comes from someone allegedly involved in the offense, the allegations against the defendant are not only "devastating to the defendant but their credibility is inevitably suspect… The unreliability of such evidence is intolerably compounded when the alleged accomplice…does not testify and cannot be tested by cross-examination." *Bruton v. United States*, 391 U.S. at 136. If such evidence is admitted, limiting instructions are insufficient to cure the prejudice it causes. *Id.*

If a *Bruton* violation occurs, it must be determined whether the error is harmless. Harmlessness exists only if the error is harmless beyond a reasonable doubt—specifically, if overwhelming evidence does not exist **absent** the hearsay statements, the error will not be deemed harmless. *Schneble v. Florida*, 405 U.S. 427 (1972); *Ryan v. Mann*, 73 F.Supp.2d 241, 250 (E.D.N.Y.1998); *United States v. Kyles*, 40 F.3d 519, 526 (2nd Cir.1994).

Hearsay evidence can, however, be admitted if it falls within a "firmly rooted" exception to the hearsay rule or it shows "particularized guarantees of trustworthiness." *State v. Debler*, 856 S.W.2d at 648; *Idaho v. Wright*, 497 U.S. 805, 814 (1990). Here, the state sought to admit Orthell's statements, asserting that it was not offering the statements for their truth but only to show the officers' conduct. *See*, *State v. Black*, 50 S.W.3d 778, 786 (Mo.banc2001).

The state's assertion is clearly not based in reality. The fallacy of that assertion is demonstrated by Sidel's comments to the court as he attempted to formulate a question that did not directly ask what Orthell had told Gage and Siscel.(Tr1395-96). His goal was to place Orthell's statements before the jury, as often as possible, despite that Orthell had not taken the stand. His goal was to have the jury hear what Kimberly's shooter said had happened.

That the state succeeded becomes apparent in light of the jury's guilt phase questions. During deliberations, the jury asked: "Why did Orthel not testify?" and, "Did Orthel make a deposition we can see?"(Tr1922). The court refused to answer, telling the jury only to be guided by its recollection of the evidence as it remembered it.(Tr1922). The jury's questions reveal two facts—first, that they considered Orthell's statements critically important in their deliberative process and second, that, despite the state's assertions to the contrary, when they heard the police testify about what Orthell had told them, they understood the testimony **not** to describe the officers' actions but instead to describe what Orthell had said.

The state attempted to found admission of Orthell's statements in an exception to the hearsay rule—that they were admitted to show subsequent conduct, not the truth of the matters asserted. Yet, they clearly were admitted to show the truth of Orthell's statements—that he had led the police to "the murder weapon" and that Kimber was involved in the offense. The state's end-run of the hearsay rule must not succeed since it has merely "set up a set of circumstances by the testimony of a witness which invites the inference of hearsay." *State v. Valentine*, 587 S.W.2d 859, 861 (Mo.banc1979); *State v. Edwards*, 435 S.W.2d 1, 6 (Mo.1968).

This Court, in *State v. Lee*, 841 S.W.2d 648 (Mo.banc1992), was asked to address the *Valentine* rule. In *Valentine*, an officer had testified that he had questioned the co-defendant about a robbery. *State v. Valentine*, 587 S.W.2d at 860. When the state asked the officer what happened next, the officer replied they had then "placed an arrest order… for Valentine." *Id*. The clear inference from the questions was that the police arrested Valentine almost immediately after questioning the co-defendant based on what they learned from the co-defendant. In *Lee*, however, the officer's testimony did not create the same inference of hearsay. It did not link the officer's actions or questions of witnesses with his subsequent conduct. This Court noted, "It would have been as reasonable for the jury to infer that the interview with Davis did not implicate appellant as to infer that it did." *State v. Lee*, 841 S.W.2d at 653.

Here, the state's questions to the officers created the same inference of hearsay that this Court condemned in *Valentine*. Without the inherent risks of putting Orthell Wilson on the stand, the state elicited that Orthell had $101 **in cash** on him right after

Kimberly Cantrell was killed, implying that this was ill-gotten gains from her murder; that Orthell had confessed to the killing, and that Orthell had led the officers to "the murder weapon." Further, by eliciting that Kimber had changed his story after being told that Orthell was in custody and had a different story than the one Kimber had originally given, the state effectively told the jury that Orthell had told the truth in implicating both himself and Kimber. Under *Bruton*, the state's questions elicited "devastating" information that the defense was powerless to counteract since the real "speaker," Orthell Wilson, was not available for cross-examination.

The real question becomes not whether a *Bruton* violation occurred but whether the resulting error was harmless. *Schneble v. Florida*, 405 U.S. 427 (1970); *Chapman v. California*, 386 U.S. 18 (1967). The facts demonstrate that it was not. The jury considered Orthell's statements critical to the state's case. After all, despite that they allegedly heard the statements merely in the context of "what the officers did next," they asked why Orthell had not testified and they asked for any written statements he gave. (Tr1922). They had heard enough to know that his testimony was critically important to decide Kimber's fate.

Further, without Orthell's statements, the jury would have been left only with Kimber's statements[16] to connect him to the offense. Since Kimber's statements were obtained only through coercion and disregard for Kimber's constitutional rights, they too

[16] See, Point III.

are suspect. Orthell's statements were vital to connect Kimber to Kimberly's death. Their admission was not harmless error.

This Court must not condone the admission of Orthell's statements through the back-door of police testimony. It must instead reverse and remand for a new trial.

V. REFUSAL TO GIVE NO-ADVERSE-INFERENCE INSTRUCTION

The trial court erred in refusing to give Instruction D, the no-adverse-inference instruction, patterned after MAI-Cr3d308.14, in penalty phase because this ruling denied Kimber due process, a fundamentally fair trial, freedom from cruel and unusual punishment and his privilege against self-incrimination under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),19,21 in that, although Kimber testified in guilt phase, he did not testify in penalty phase and, when counsel requested that the court instruct the jury that it could not draw any adverse inference from Kimber's failure to testify, the court refused. The failure to give that instruction inescapably impressed on the jury's consciousness that Kimber had not testified and left it free to consider that fact in making its penalty phase decision.

This Court decided *State v. Storey*, 986 S.W.2d 462 (Mo.banc1999) and *State v. Mayes* 63 S.W.2d 615 (Mo.banc2002), well before Kimber's trial began. Indeed, *Mayes* was handed-down some four months before. In both, this Court found the failure to give a no-adverse inference instruction reversible error. Nonethless, when Kimber requested this instruction, the trial judge opined that MAI-Cr3d 308.14 applies only to guilt phase and that this Court would have to tell him that he erred in refusing a penalty phase instruction based on it. This Court must accept that invitation and reverse and remand for a new penalty phase.

Kimber testified in guilt phase.(Tr1802-80). In penalty phase, he did not.(See Tr1936-2031). At the penalty phase instruction conference, counsel tendered to the court

an instruction modeled on MAI-Cr3d 308.14, modified by removing the words "of guilt." (Tr1988-89). That instruction, Instruction D, read:

> Under the law, a defendant has the right not to testify. No presumption may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.

(LF492). The court refused the instruction, stating "as I read that instruction, the words 'of guilt' are not in—they appear to be substantive in that instruction, which would indicate it only applies to the guilt phase."(Tr1989).

At the hearing on the new trial motion, counsel argued that the court had erred in refusing Instruction D, a claim counsel had included in the new trial motion.(Tr2084-91;LF561-63). The court denied the motion, stating, "The Supreme Court is going to have to tell me that the instructions were erroneous. I don't feel they were under these circumstances and I stick by my decision to refuse to give that instruction in this particular case in the penalty phase."(Tr2093).

The Fifth Amendment privilege against self-incrimination guarantees to defendants the right to remain silent and the right that the jury draw no adverse inferences from their silence. *State v. Storey*, *supra*; *State v. Mayes*, *supra*; *Carter v. Kentucky*, 450 U.S. 288, 305 (1981). Those rights extend to both phases of a capital trial. *State v. Storey*, 986 S.W.2d at 463; *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981).

The United States Supreme Court has recognized the critical importance of the no-adverse-inference instruction. It has been almost universally thought that juries notice a defendant's failure to testify. "[T]he jury will, of course, realize this quite evident fact,

even though the choice goes unmentioned….[It is] a fact inescapably impressed on the jury's consciousness."... "The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." *Carter v. Kentucky*, 450 U.S. at 301; citing *Griffin v. California*, 380 U.S. 609, 621 (1965); 8 J. Wigmore, Evidence §2272, p. 426 (J.McNaughton rev. 1961).

To ensure that jurors not transform the defendant's failure to testify into an aggravating circumstance, a no-adverse-inference instruction is also necessary in penalty phase. *Carter v. Kentucky*, 450 U.S. at 302; *State v. Storey*, 986 S.W.2d at 463. Although courts cannot prevent jurors from speculating about why a defendant does not answer the charges against him in either phase, the "powerful tool" of jury instructions reduces that speculation. *State v. Mayes*, 63 S.W.3d at 635; *Carter v. Kentucky*, 450 U.S. at 303.

If a defendant does not testify in penalty phase, the court **must** give the no-adverse-inference instruction upon the defendant's request. *State v. Storey*, 986 S.W.2d at 464. Twice this Court has been asked to review the trial court's refusal to do so. Twice it has reversed for a new penalty phase. *Id.*at 466; *State v. Mayes*, 63 S.W.3d at 640.

Storey and *Mayes* demonstrate that the court's refusal to give Instruction D was error. The only question remaining is whether that error was harmless beyond a reasonable doubt, a burden that is the state's. *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Mayes*, 63 S.W.3d at 636. It was not.

As in *Storey*, Kimber's jury never heard the no-adverse-inference instruction because Kimber testified in guilt phase.[17] But, as this Court noted in *State v. Mayes*, *supra*, despite the seemingly well-known privilege against self-incrimination, since jurors' beliefs and expectations run counter to the privilege, we require "'that a defendant can demand an instruction forbidding the jury from drawing such an inference.'" 63 S.W.3d at 637-38, citing *Old Chief v. United States*, 519 U.S. 172, 189 n.9 (1996). Without an instruction, the inferences the jury may draw from the defendant's silence "may be unfairly broad," *State v. Storey*, 986 S.W.2d at 465, citing *Carter v. Kentucky*, 450 U.S. at 301 n.17. The only time the jury heard anything about the privilege was during jury selection, over a week before the case was submitted to them in penalty phase, when counsel did general voir dire on the right not to testify.(Tr833-35). That portion of voir dire never mentioned penalty phase. Further, as this Court noted in *Storey, supra*, "[s]tatements by defense counsel… 'cannot have the purging effect that an instruction from the judge would have had.'" 986 S.W.2d at 465; citing *Carter v. Kentucky*, 450 U.S. at 304.

[17]In *Storey*, the jury never heard the instruction because *Storey* was a penalty-phase-only re-trial. The state attempted to distinguish *Mayes* as to prejudice from *Storey* by noting that in *Mayes* at least, the jury had heard the instruction, while in *Storey* it never did.

This Court has repeatedly recognized that, although the strength of the state's case[18] may be a factor in deciding if an error is harmless, "it cannot be the deciding fact in determining whether the failure to give a no-adverse-inference instruction was harmless in the penalty phase of a capital murder trial." *State v. Mayes*, 63 S.W.3d at 637. Missouri's penalty phase procedure is not, after all, a question of which side proves more statutory factors. §565.030.4(4)RSMo. Rather, the jury has discretion to choose life even if mitigators do not outnumber or outweigh aggravators. *Id.*; *State v. Storey*, 986 S.W.2d at 465. "In light of this discretion, the prejudice against a defendant who invokes the privilege—prejudice which is 'inescapably impressed on the jury's consciousness'—is not purely speculative as the State suggests." *Id*.at 464-65, citing *Carter v. Kentucky*, 450 U.S. at 301 n.18.

Although an independent violation of the Fifth Amendment, *Griffin v. California*, 380 U.S. 609 (1965), Sidel's comments in penalty phase closing on Kimber's failure to testify exacerbates the prejudice from the lack of an instruction. After hearing the court's instructions, *sans* Instruction D, how did Sidel begin his opening argument? By telling the jury, "What's the one thing we haven't heard about that Kimber Edwards has

[18]Kimber does not suggest that the state's evidence is overwhelming. Rather, without his questionably-obtained statements, Point III, and Orthell's hearsay statements, Point IV, the state's case would not have survived a motion to dismiss. Further, this Court did not find harmlessness in *State v. Mayes*, a double-murder case involving multiple aggravators. *State v. Mayes*, 63 S.W.3d at 637. Here the jury found only one aggravator.

expressed to anyone, remorse. Any remorse, any sadness about the killing of Kimberly Cantrell and why haven't you heard about it? Because he hasn't obviously expressed it to anybody."(Tr2031). Sidel thus called the jury's attention to Kimber's failure to testify in penalty phase and encouraged the jury to consider it in deciding life or death. *See State v. Mayes*, 63 S.W.3d at 637 n.13; *De los Santos v. State*, 918 S.W.2d 565, 570-51 (Tex.App.1996).

The trial court inexplicably ignored this Court's directives in *State v. Storey* and *State v. Mayes*, refusing to give the no-adverse-inference instruction in penalty phase. That error was not harmless beyond a reasonable doubt. This Court must accept the trial court's invitation to tell it that it erred, by reversing and remanding for a new penalty phase.

VI. INSUFFICIENT EVIDENCE SUPPORTS SOLE AGGRAVATOR

The trial court erred in submitting Instruction 17, accepting the jury's penalty phase verdict and sentencing Kimber to death because these rulings violated Kimber due process, a fair jury trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that the sole aggravator that the jury found—whether Kimber hired Orthell Wilson and/or a person known only as Michael to murder Kimberly Cantrell—was supported by insufficient evidence. Orthell's statements were not admitted for their truth, thus the sole evidence upon which rested the existence of the aggravator was Kimber's statements. Since the aggravator was the sole element of the charge in penalty phase, the state was required to prove it by evidence other than merely Kimber's statements.

In Missouri, a death sentence must be supported by the jury's unanimous finding beyond a reasonable doubt of at least one statutory aggravating circumstance. *Ervin v. State*, 80 S.W.3d 817, 826 (Mo.banc2002); §565.030(4)RSMo. If such a finding cannot be made, the only possible sentence is life without parole. Here, the jury found, as the sole statutory aggravating circumstance, that "the defendant hired Orthell Wilson and/or a person known only as Michael to murder Kimberly Cantrell."(LF494). The only evidence supporting that finding was Kimber's statements to the police. Since the sole issue for the jury to find in penalty phase was the existence of the aggravating circumstances, the state had to prove those circumstances independently of Kimber's

statements. It did not. Therefore, this Court must reverse and order that Kimber be re-sentenced to life imprisonment without probation or parole.

The state submitted as statutory aggravating circumstances:

- Whether the defendant murdered Kimberly Cantrell for the purpose of the defendant receiving money or any other thing of monetary value from Kimberly Cantrell.
- Whether the defendant hired Orthell Wilson and/or a person known only as Michael to murder Kimberly Cantrell.
- Whether Kimberly Cantrell was a witness in a pending prosecution in St. Louis County Circuit Court Cause Number 00CR-990, State of Missouri vs. Kimber Edwards, the charge of Criminal Non-Support, a class D felony and was killed as a result of her status as a witness.

(LF485). The jury found beyond a reasonable doubt only one of these circumstances, "Whether the defendant hired Orthell Wilson and/or a person known only as Michael to murder Kimberly Cantrell."(LF494).

Consonant with Supreme Court jurisprudence, §565.030RSMo and MAI-Cr3d313.40 require that at least one statutory aggravating circumstance be found unanimously and beyond a reasonable doubt for the jury even to consider imposing the death penalty. Aggravators thus function as the sole elements of the offense to be proved in penalty phase. As the dissenters noted in *Walton v. Arizona*, 497 U.S. 639, 709 n.1 (1990)(Stevens, J., dissenting), aggravators function as the statutory "elements" of the offense since, "in their absence, [the death] sentence is unavailable." Indeed, as Justice

Scalia noted in his later concurrence in *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Scalia, J., concurring), "all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."(emphasis added). However it is labeled, the aggravating factor **is** an element of the offense, and, for penalty phase, is that which the state must prove beyond a reasonable doubt. *Ring v. Arizona*, 122 S.Ct. 2428, 2443 (2002); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

What evidence supported the existence of the statutory aggravator—that Kimber had hired Orthell or someone named Michael to kill Kimberly—that the jury found? As the state repeatedly asserted, Orthell's statements to the police, in which he apparently told them that Kimber had hired him, were not admitted for their truth but merely to show the officers' subsequent conduct.(Tr1265-66,1344,1394-96). Thus, Kimber's statements were the only evidence supporting this aggravator.

Missouri courts have steadfastly adhered to the rule that, absent independent proof, direct or circumstantial, of the essential elements of the corpus delicti, the defendant's extrajudicial admissions or statements are not admissible. *State v. Summers*, 362 S.W.2d 537, 542 (Mo.1962); *State v. Crawford*, 32 S.W.3d 201, 205 (Mo.App.,S.D.2000); *State v. Hammons*, 964 S.W.2d 509, 512 (Mo.App.,W.D.1998); *State v. Scott*, 996 S.W.2d 745, 747-48 (Mo.App.,E.D.1999). If such statements are improperly admitted, they are insufficient to sustain the conviction. *Id*.; *State v. Summers*, 362 S.W.2d at 542.

For the state to gain its penalty phase objective of the death penalty, "the offense" to be proved is the statutory aggravator, and that aggravator must be proved by evidence independent of the defendant's statements. While Missouri courts have yet to address this question, those courts that have, have reached this conclusion. In *Emery v. State*, 881 S.W.2d 702 (Tex.Crim.App.,1994), the court acknowledged that the corpus delicti of both the murder and of the factors that elevate it to capital status—i.e., aggravators, must be proved by evidence independent of the defendant's extrajudicial statements. This, it explained, was

> "Because the essential purpose of the corroboration requirement is to assure that no person be convicted without some independent evidence showing that the very crime to which he confessed was actually committed, we agree that the corpus delicti of capital murder includes more than merely homicide by criminal agency. In the present context, we hold that evidence independent of appellant's confession was required to show that his victim had been kidnapped."

Id. citing *Gribble v. State*, 808 S.W.2d 65, 71 (Tex.Crim.App.,1990); *Accord, Comm. v. Bardo*, 709 A.2d 871, 875 (Pa.1998).

Death is different. *Furman v. Georgia*, 408 U.S. 238 (1972)(per curiam). To minimize the risk that death be arbitrarily and capriciously imposed, we have insisted that the sentencer's discretion in imposing death be channeled and limited. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). Given the expectation that penalty phase procedures provide the heightened reliability necessary to ensure the constitutional validity of a death sentence, this Court should recognize the applicability of the "corpus

delicti" rule to penalty phase. This Court must, therefore, reverse and order that Kimber be re-sentenced to life imprisonment without probation or parole.

VII. COMMENTS ON FAILURE TO PLEAD GUILTY

The trial court erred and abused its discretion in overruling Kimber's objections to repeated statements about Kimber's failure to plead guilty to criminal non-support because those rulings violated Kimber due process, to be tried solely for the pending charge, a fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that the comments encouraged the jury to convict Kimber of first degree murder based on his failure to plead guilty to another offense, and thus used his exercise of his constitutional rights in another case to suggest guilt in both cases.

Although the indictment charged Kimber with first degree murder and armed criminal action (LF20-21), the state encouraged the jury also to try and convict him of criminal non-support. It encouraged the jury to do so, in part, because Kimber exercised his constitutional rights and had not pled guilty to non-support. Since the state asserted that the non-support case was the motive for the homicide, Kimber was prejudiced by this irrelevant, highly prejudicial and improper evidence. This Court should reverse and remand for a new trial.

Sidel stated in guilt phase opening that Kimber "became increasingly behind in his child support payments to the point that in March of 2000 a charge of criminal nonsupport of the minor child was filed."(Tr945). He then defined for the jury the offense of criminal non-support.(Tr945). In guilt phase, Sidel called Prosecutor Lange, who began prosecuting a criminal non-support case against Kimber, filing the complaint in March, 2000.(Tr1662-63). Lange testified that the matter had been set for a scheduling

conference on August 25, 2000, when the parties would be asked if any agreements had been reached or if they would go to trial.(Tr1673-74,1685). Lange noted that, while Kimberly Cantrell had received notice of the conference, her appearance was unnecessary.(Tr1696). Lange stated that he had sent a letter to Kimber's attorney, Doug Richards, offering a standard deal to resolve the criminal non-support case.(Tr1687-91;ExhN). Lange noted that, while there had been some discussions in the case, they had never progressed to accepting or rejecting the offer.(Tr1691).

On re-direct, Sidel stated, over objection, "But he did not take that offer on August the 25th."(Tr1705). Over objection, he drove this home:

Sidel: Kimber Edwards came to court on August 25th of 2000 he did not plead guilty?

Lange: No.

Sidel: He did not plead guilty?

Lange: He did not.

(Tr1706). At the close of his examination, Sidel reiterated:

Lange: No, he did not plead.

Sidel: Even though the offer was still available to him?

Lange: Yes, the offer was still available to him on that date.

(Tr1707).

Finally, in Sidel's guilt phase closing, he argued, "He had no motive to want to kill her? They had worked out a plan, Toby told you about, of him taking an SIS, five years probation. What's the fine print?…So what does he have to do. He's going to have to

make sure, not only is he not going to plead to this thing, and when he said, well, he wouldn't plead,…"(Tr1916-17). Kimber preserved his challenge to this testimony in his new trial motion.(LF549). The court erred and abused its discretion in allowing the state to condemn Kimber for exercising his constitutional rights in another case.

An accused is entitled to a fair trial and the prosecutor must do nothing to deprive him of one. *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27 (banc1947). The prosecutor must not improperly gain a wrongful conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935); *Rule 4-3.4*. Prosecutorial misconduct may be so outrageous that it violates due process and the Eighth Amendment. *Newlon v. Armontrout*, 885 F.2d 1328, 1337 (8thCir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364 (8thCir.1995).

Missouri courts repeatedly have recognized that criminal defendants have the right to be tried only for the offense with which they are charged. *State v. Burnfin*, 771 S.W.2d 908, 911 (Mo.App.,W.D.1989); *State v. Theus*, 967 S.W.2d 234, 239 (Mo.App.,W.D. 1998); *State v. Belcher*, 805 S.W.2d 245, 248 (Mo.App.,S.D.1991). Admitting evidence of other crimes infringes that right because that evidence may result in a conviction actually based on crimes of which the defendant is not presently accused. *State v. Trimble*, 638 S.W.2d 726, 732 (Mo.banc1982); *State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo.banc1989).

Evidence of other crimes may be admitted, however, to show motive, intent, absence of mistake or accident, common scheme or plan or identity of the person charged. *State v. Burnfin*, 771 S.W.2d at 911. At first blush, therefore, it would seem that evidence and argument about the criminal non-support case was appropriate. Had the

evidence been limited to references to the action itself, it may have been. Sidel, however, stepped well beyond that line.

Sidel's evidence and argument about the criminal non-support case focused not merely on the existence of the case. He repeated, at least six times, even in guilt phase closing argument, that Kimber had not pled guilty to the charge. Sidel condemned Kimber's exercise of his constitutional right to trial and to require the state to meet its burden of proof. *See Griffin v. California*, 380 U.S. 609 (1965); *Shepard v. Maxwell*, 384 U.S. 333, 362 (1966); *Jackson v. Virginia*, 443 U.S. 307 (1979); *State v. Clay*, 975 S.W.2d 121, 137 (Mo.banc1998). Since Sidel exceeded the proper presentation of this kind of evidence and argument, whatever relevance it generally might have had was outweighed by the extreme prejudice engendered by the improper references to Kimber's exercise of his constitutional rights. *State v. Belcher*, 805 S.W.2d at 249; *State v. Bannister*, 680 S.W.2d 141, 147 (Mo.banc1984).

The trial court erred and abused its discretion in overruling Kimber's repeated objections to this evidence. This Court should reverse and remand for a new trial.

VIII. FAILURE TO DISCLOSE DEFENDANT'S STATEMENT

The trial court abused its discretion in denying the defense request for a mistrial when Detective Brady testified that Kimber had told him "it's not his business. He had nothing to do with it" because this ruling denied Kimber due process, a fair trial, confrontation, effective assistance of counsel and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,,Art.I,§§10,18(a),21 and violated Rule 25.03 in that the state failed to disclose this statement by Kimber, despite discovery requests under Rule 25 and §565.005 RSMo, and the state used the statement to portray Kimber as uncaring and unremorseful about Kimberly's death.

In guilt phase, Sidel repeatedly sought to portray Kimber as cold—cold as ice—about his ex-wife's death. In guilt phase, he harped on this being a contract killing and said if that fact didn't prove cool reflection, nothing did.(Tr1893). In penalty phase, he reminded the jury in closing that they had never heard Kimber express remorse or sadness about Kimberly's death.(Tr2031). To support this pervasive theme, Sidel had his witnesses call Kimber's reaction to their questions "nonchalant" because of his expression and his statements that her death wasn't his business and he had nothing to do with it. But, while Sidel relied on those statements to push his agenda in both phases, he neglected to disclose them to the defense. Instead, he chose to spring them during trial, giving the defense no opportunity to prepare for them. The state's actions and the trial court's refusal to grant a mistrial violated Kimber's state and federal constitutional rights to due process, a fair trial, to confrontation, to effective assistance of counsel, and

freedom from cruel and unusual punishment. This Court should reverse and remand for a new, fair trial.

Pre-trial, pursuant to Rule 25.03, Kimber requested discovery from the state, including "any written or recorded statements and the substance of any oral statements made by the defendant or by a codefendant" (LF26-27,49-52). Rule 25.03 provides that "the state **shall**, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information" including the defendant's statements.(emphasis added).

Detective Brady testified during the state's guilt phase case that he and Sergeant Coleman interrogated Kimber at 5a.m. the morning he was first brought into custody. (Tr1187-88). Brady told Kimber that Kimberly had been found dead, a fact someone else had already told Kimber.(Tr1189). Brady said that Kimber was "very nonchalant, had a smile on his face" and didn't seem to be distressed by the news. (Tr1190). Brady then "told [Kimber] I couldn't understand how he could just sit there and be so relaxed and have such a carefree attitude knowing that his ex-wife, the mother of his daughter, was killed."(Tr1190). Sidel then asked, "Did he have any response?"(Tr1190). Brady said Kimber "shook his head with a smile, **said** it's not his business. He had nothing to do with it."(Tr1190)(emphasis added).

Counsel immediately moved for a mistrial because these statements by Kimber had never been disclosed and were never mentioned in Brady's deposition.(Tr1191). Sidel responded that Brady's testimony about "the statement is an impression"(Tr1191) and denied that Brady had testified that Kimber had made a statement.(Tr1192). The

court acknowledged that Brady testified about the statement and stated that he would deny counsel's request for a mistrial and instruct the jury to disregard.(Tr1192). Counsel reiterated his objection, noting that the so-called curative instruction would not cure the problem since the damage had already been done.(Tr1193). Counsel preserved the challenge in his new trial motion.(LF542).

As counsel had predicted, the damage had been done. Despite the court's limiting instruction, the state utilized the exchange to build its case in both phases. In guilt phase closing, Sidel argued that when the officers interrogated Kimber early that morning, "they question him and he says, I don't know anything about this murder. In fact, remember he's even described back at the scene as being relatively nonchalant." (Tr1887). Sidel then closed by reminding they jury that "the only distinction between murder first degree and murder second degree is the issue of deliberation."(Tr1892). He said, "If a contract killing is not cool reflection then, there is no cool reflection. This is first degree murder or nothing."(Tr1893). Later, in penalty phase closing, Sidel continued his theme, telling them, "What's the one thing we haven't heard about that Kimber Edwards has expressed to anyone, remorse. Any remorse, any sadness about the killing of Kimberly Cantrell and why haven't you heard about it? Because he hasn't obviously expressed it to anybody."(Tr2031). He argued, "This was not just a mistake, one time isolated incident. This was cold and it was dispassionate…"(Tr2032). He added, "There is nothing colder, nothing more dispassionate, nothing more premeditated than paying somebody…"(Tr2033), and then, in final closing argument, he told them, "you look at the significance of what he did, again, coldly, dispassionately, a business

like decision about money…."(Tr2048). The state thus used Kimber's nonchalance, as expressed through his statements to police when initially interrogated, as the foundation for its case for deliberation—cool reflection—and for death—since Kimber denied involvement in Kimberly's death and his reaction to her death was labeled nonchalant. Because of the pervasive use of this piece of evidence by the state, it was vital that it be disclosed. Yet, the state chose to keep it under wraps, springing it during trial. A mistrial was warranted.

Discovery is intended to give the defendant a decent opportunity to prepare before trial and to avoid surprise. *State v. Scott*, 943 S.W.2d 730, 735 (Mo.App.,W.D.1997); *State v. Farr*, 69 S.W.3d 517, 522-23 (Mo.App.,S.D.2001); *State v. Mease*, 842 S.W.2d 98, 104 (Mo.banc1992). The rules governing criminal discovery are not "mere etiquette" and compliance with them is not discretionary. *State v. Scott*, 943 S.W.2d at 735; *State v. Greer*, 62 S.W.3d 501, 504 (Mo.App.,E.D.2001). The trial court has discretion to determine if discovery rules are violated and then to determine the appropriate remedy. *State v. Carlisle*, 995 S.W.2d 518, 520 (Mo.App.,E.D.1999). The trial court's denial of a requested sanction will be deemed an abuse of discretion if the non-disclosure created fundamental unfairness. *State v. Spencer*, 49 S.W.3d 221, 223 (Mo.App.,S.D.2001). Fundamental unfairness exists "when the State's failure to disclose results in defendant's genuine surprise at learning of an unexpected witness or evidence and the surprise prevents meaningful efforts by the defendant to consider and prepare a strategy for addressing the state's evidence." *State v. Johnston*, 957 S.W.2d 734, 750 (Mo.banc1997).

The trial court must carefully tailor the remedy to actually alleviate the harm caused by the discovery violation. *State v. Whitfield*, 837 S.W.2d 503, 507 (Mo.banc1992).

The state clearly failed to comply with its obligations under the discovery rules by not disclosing Kimber's statements to Brady and Coleman. Despite Sidel's protestations that Brady was only recounting his observations, not a statement, even the trial court recognized that a violation had occurred. It tried to remedy the situation by telling the jury to disregard Brady's last statement.(Tr1193). But, as counsel told the court, that ruling remedied nothing.

Only a mistrial would have cured the prejudice the state caused by its failure to disclose. *See State v. Scott*, 943 S.W.2d at 736. The state's theory, as demonstrated by its arguments in both phases, was that Kimber had coolly, coldly, thought-out his wife's murder and that this very coldness, which underpinned all of his plans, was evidenced in his attitude the morning after her body was discovered. He was nonchalant and told the officers that he didn't care. Brady testified, over objection, that Kimber was nonchalant. This was his perception, and, since it was a highly subjective conclusion, was subject to challenge by the defense. Kimber's statements were in marked contrast since they were his own words—objective manifestations of his attitude. Without those statements, counsel could discount Brady's testimony, asking the jury, "how **should** someone react?" or, even more critical, "does Detective Brady know Kimber well enough to know if he's acting nonchalantly? How would he know this?" The statements, however, effectively foreclosed counsel's attack on Brady's testimony. Their surprise disclosure during trial left counsel unable to formulate an approach to meet the state's evidence.

The state's failure to disclose Kimber's statements created fundamental unfairness. This Court should reverse and remand

IX. IMPROPER ARGUMENTS IN BOTH PHASES

The trial court plainly erred in not declaring a mistrial *sua sponte* when the prosecutor argued that:

IN VOIR DIRE

1. the State would have the burden of proving to your satisfaction unanimously;

2. this is a case in which there was a contract killing;

IN GUILT PHASE CLOSING

3. this child was denied the joy of having her mother seeing her go to high school prom;

4. they see this terrible sight, the tragedy Phyllis will never forget and that picture of your sister lifeless on the floor;

5. you know what, I don't think most people in here believe that Michael actually exists;

6. if a contract killing is not cool reflection then there is not cool reflection;

7. this is a correctional officer who deals with prisoners in the course of his profession, do you think that he's ever met a person yet who's told him they confessed to a murder to make it easier for his family to help himself out, to help his family for him to confess to the murder he had no involvement in;

8. And this business about Florida, he couldn't do any of the things he said because he was in Florida. Was anybody offended by that? Here's a guy who

hasn't paid child support taking trips to Florida. It's not just a trip, he's looking at a time share to buy into;

9. Penitentiaries in the state of Missouri are filled with people who have been found guilty beyond a reasonable doubt. It is not an impossible burden just because of this nonsense about Michael and we couldn't prove that he bought the checks;

<u>IN PENALTY PHASE CLOSING</u>

10. What's the one thing we haven't heard about that Kimber Edwards has expressed to anyone, remorse. Any remorse, any sadness about the killing of Kimberly Cantrell. And why haven't you heard about it? Because he hasn't obviously expressed it to anybody;

11. there is nothing worse than hiring somebody else to do your dirty work for you;

12. we would be bringing every witness in a criminal case through a back door in handcuffs because who would want to show up if they felt there was a chance that they'd be killed, and, if there was ever a case in which the death penalty was merited, it's a case in which a person has a criminal witness scheduled because the system will break down;

13. You don't have to do it, but if there was a case in which a person deserved it, based on their conduct, and whether they've had a very nice, comfortable existence up until now, well, you know, if you look at it, if you look at the comfort of his lifestyle up until now, it makes it worse; and

14. most fathers in their divorce cases don't enjoy child support, but you know they do it because it's the right thing to do and if they love their child, they really do it. This love of Erica, this child he wouldn't even support, I don't buy it because these arguments denied Kimber due process, a fair trial and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that they misstated the law, argued the case in voir dire, was victim impact in guilt phase, converted Sidel into an unsworn witness, referred to facts not in evidence, urged conviction based on uncharged conduct, commented on Kimber's failure to testify in penalty phase and converted mitigators into aggravators.

The prosecutor committed repeated misconduct in his arguments in both phases of Kimber's trial and, during voir dire, he misstated the law and argued the case to the venire despite that the defense had put him on notice that the arguments were improper through a pre-trial Motion in Limine To Prohibit Improper Arguments During First and Second Stage of Trial.(LF124-42). "The touchstone of due process analysis is the fairness of the trial." *Smith v. Phillips*, 455 U.S. 209, 219(1982); *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1524 (W.D.Mo.1996), aff'd, 145 F.3d 1006 (8th Cir.1998). A defendant is entitled to a fair trial and a prosecutor must ensure he gets one. *State v. Tiedt*, 357 Mo. 115, 206 S.W.2d 524, 526-27 (banc1947). If he doesn't, a wrongful conviction would ensue. *Berger v. United States*, 295 U.S. 78, 88 (1935); *Rule 4.3.8*.

Prosecutorial misconduct in argument is unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."

Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Prosecutorial misconduct may be so outrageous that it violates due process and the Eighth Amendment. *Newlon v. Armontrout*, 885 F.2d 1328, 1337 (8thCir.1989); *Antwine v. Delo*, 54 F.3d 1357, 1364 (8th Cir.1995); *State v. Rhodes*, 988 S.W.2d 521, 528-29 (Mo.banc1999).

The prosecutor's repeated, intentional misconduct denied Kimber's state and federal constitutional rights to due process, a fair trial and freedom from cruel and unusual punishment. The trial court plainly erred, *Rule 30.20*, in not *sua sponte* declaring a mistrial. This Court must reverse and remand for a new trial.

VOIR DIRE

The purpose of voir dire is to discover prejudice or bias so that a fair and impartial jury is selected. *State v. Clark*, 981 S.W.2d 143, 146 (Mo.banc1998). Despite a "liberal attitude" in examining jurors, arguing or presenting detailed facts is improper. *Id*.; *State v. Antwine*, 743 S.W.2d 51, 58 (Mo.banc1987); *State v. Granberry*, 484 U.S. 295, 299 (Mo.banc1972). Similarly, misstating the law is never to be condoned. *State v. Storey*, 901 S.W.2d 886, 902 (Mo.banc1995); *Tucker v. Kemp*, 762 F.2d 1496, 1507 (11thCir. 1985); *Drake v. Kemp*, 762 F.2d 1449, 1458-59 (11thCir.1985)(en banc).

Sidel misstated the law, telling the jury that, in penalty phase, "the State would have the burden of proving *to your satisfaction* unanimously that one or more aggravating circumstances exists…."(Tr370)(emphasis added). The quantum of proof required for constitutional validity of a death sentence is beyond a reasonable doubt, not to particular jurors' satisfaction. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ervin v. State*, 80 S.W.3d 817, 826 (Mo.banc2002); §565.030RSMo.

Sidel also argued the case in voir dire, telling the jury that this case involved a contract killing.(Tr612,655). This was an issue for the jury to resolve at trial, not a stipulated fact. Sidel's argument, suggesting the contract killing was fact, improperly sought to relieve the state of its burden of proof on that element of its case. *State v. Clark*, 981 S.W.2d at 146; *State v. Antwine*, 743 S.W.2d at 58.

GUILT PHASE

The state and federal constitutions and §565.030.4RSMo permit victim impact evidence and argument in penalty phase. *State v. Simmons*, 955 S.W.2d 752, 766 (Mo.banc1997); *Simmons v. Bowersox*, 235 F.3d 1124 (8thCir.2001); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). They do not, however, permit it in guilt phase since it is irrelevant to proof of any element of the offense. *Id.*; *State v. Griffin*, 848 S.W.2d 464, 471 (Mo.banc1993); see *State v. Debler*, 856 S.W.2d 641, 656 (Mo.banc1993). Nonetheless, Sidel argued "This (indicating) child was denied the joy of having her mother seeing her while she is going to high school proms, the joy of having her mother help her plan her wedding, the joy of her mother seeing her daughter grow in with a family…" (Tr1881) and "the tragedy Phyllis will never forget and that picture of your sister laying lifeless on the floor."(Tr1885). Sidel improperly argued victim impact in guilt phase to heighten the jurors' emotional response to Kimberly's death and obtain a guilty verdict based on emotion and passion, not on reason and common sense. *State v. Burnfin*, 771 S.W.2d 908, 911 (Mo.App.,W.D.1989).

Sidel also personalized the case to himself, telling the jury, "I don't think most people in here believe that Michael actually exists…."(Tr1891). A prosecutor's

statements about his personal beliefs, opinions or feelings are improper. *State v. Storey*, 901 S.W.2d at 901. Such statements tend to carry weight with the jury since they turn the prosecutor into an unsworn witness. Since he is acting in his official capacity, they encourage the jury to credit his statements more than they should. *Id.*; *Brooks v. Kemp*, 762 F.2d 1383, 1408 (11thCir.1986).

Sidel also repeatedly improperly referred to facts not in evidence. *State v. Storey*, 901 S.W.2d at 900-01; *State v. Cuckovich*, 485 S.W.2d 16 (Mo.banc1972). He argued, "if a contract killing is not cool reflection then there is not cool reflection"(Tr1893); "this is a correctional officer who deals with prisoners in the course of his profession, do you think that he's ever met a person yet who's told him they confessed to a murder to make it easier for his family to help himself out, to help his family for him to confess to the murder he had no involvement in" (Tr1916) and "Penitentiaries in the State of Missouri are filled with people who have been found guilty beyond a reasonable doubt. It is not an impossible burden just because of this nonsense of about Michael and we couldn't prove that he bought the checks."(Tr1920-21). Sidel's arguments encouraged the jury to believe his rendition of facts because he was the prosecutor. His assurances to the jury that, compared to other cases and other defendants, Kimber was clearly guilty of first degree murder, were improper. *Brooks v. Kemp*, 762 F.2d at 1403, 1410; *Drake v. Kemp*, 762 F.2d at 1459.

Sidel also encouraged the jury to convict Kimber because of other, uncharged conduct. He told them, "And this business about Florida, he couldn't do any of the things he said because he was in Florida. Was anybody offended by that? Here's a guy who

hasn't paid child support taking trips to Florida. It's not just a trip, he's looking at a time share to buy into."(Tr1918). An accused must be tried only for the charged offense. *State v. Burnfin*, 771 S.W.2d at 911. Argument that encourages conviction based on other conduct is improper. *State v. Trimble*, 638 S.W.2d 726, 732 (Mo.banc1982).

PENALTY PHASE CLOSING

In capital cases, closing arguments must undergo a "greater degree of scrutiny." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

Sidel led off his penalty phase closing by commenting on Kimber's failure to testify. *State v. Barnum*, 14 S.W.3d 587, 591 (Mo.banc2000); §546.270RSMo. He stated, "What's the one thing we haven't heard about that Kimber Edwards has expressed to anyone, remorse. Any remorse, any sadness about the killing of Kimberly Cantrell. And why haven't you heard about it? Because he hasn't' obviously expressed it to anybody."(Tr2031)*Compare, De Los Santos v. State*, 918 S.W.2d 565 (Tex.App.1996).. Exacerbating the prejudice from Sidel's argument was the court's failure to give the no-adverse-inference instruction in penalty phase.[19]

Yet again, Sidel raised the spectre of other cases, of facts outside the evidence. *State v. Storey*, 901 S.W.2d at 901; *Brooks v. Kemp*, 762 F.2d at 1403, n. 29, 1410. He argued, "there is nothing worse than hiring somebody else to do your dirty work for you" (Tr2034); "we would be bringing every witness in a criminal case through a back door in handcuffs because who would want to show up if they felt there was a chance that they'd

be killed, and, if there was ever a case in which the death penalty is merited, it's a case in which a person has a criminal witness scheduled because the system will break down." (Tr2035). These arguments impermissibly played on the jury's susceptibility to believe Sidel, an unsworn witness, because they suggested that he had outside, superior knowledge.

Sidel also impermissibly encouraged the jury to change mitigators into aggravators. *Zant v. Stephens*, 462 U.S. 862 (1983). He stated, "You don't have to do it, but if there was a case in which a person deserved it, based on their conduct, and whether they've had a very nice, comfortable existence up until now, well, you know, if you look at it, if you look at the comfort of his lifestyle up until now, it makes it worse…." (Tr2037). Since the penalty phase mitigation had been a description of Kimber's middle class upbringing, his love and care for his family, this argument was grossly improper.

Finally, as in guilt phase, Sidel again argued facts outside the record, or, indeed, mere speculation, and again became an unsworn witness against Kimber. *State v. Storey*, 901 S.W.2d at 901. He also encouraged the jury to condemn Kimber because of other conduct, the failure to pay child support, not because of his acts in this case. *Id.* He told them, "most fathers in their divorce cases don't enjoy child support, but you know they do it because it's the right thing to do and if they love their child, they really do it. This love of Erica, this child he wouldn't even support, I don't buy it."(Tr2048). This argument undermined the jury's discretion and rendered its decision fundamentally unreliable. *Brooks v. Kemp*, 762 F.2d at 1410.

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[19] See Point V.

Sidel's arguments throughout trial were grossly improper. They were intended to and did impact the jury's verdicts in both phases. This Court must reverse and remand for a new trial.

X. RING/APPRENDI VIOLATION

The trial court erred in overruling Kimber's Motion to Quash the Information for Failure to Comply with *Apprendi v. New Jersey* and *Jones v. United States* and lacked jurisdiction to sentence Kimber to death because this ruling denied Kimber due process, notice of and to be tried and sentenced for the charged offense, a jury trial, and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,17,18(a),21 and §565.030.4(1) in that Missouri's statutory scheme authorizes a death sentence only upon a finding of at least one of 17 statutory aggravating circumstances. These are facts that the state must prove to increase the punishment for first degree murder from life imprisonment without probation or parole to death. Since this indictment failed to plead any aggravating circumstances it did not include any of the facts that would authorize enhancing the sentence to death and thus did not charge an offense that would authorize a sentence of death.

Missouri's statutory scheme for imposing the death penalty utilizes a penalty phase singularly like a guilt phase trial. *Bullington v. Missouri*, 451U.S. 430, 438 (1981). Distinct from garden-variety sentencing hearings, a penalty phase trial has all "the hallmarks of the trial on guilt or innocence," *Id.*at 439, including the requirement that the state prove the additional facts—the aggravating circumstances that make the defendant death-eligible—beyond a reasonable doubt. *Id.*at 441. "Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" *Id.*at 444(emphasis in

original). The "case," in the penalty phase context, is the statutory aggravating circumstances, through which the state seeks the death penalty.

Because of the nature of the penalty phase proceedings in Missouri, to satisfy due process, notice and the right to a jury trial under the state and federal constitutions, the state was required to have charged those statutory aggravating circumstances in the indictment. Since it did not, the court lacked jurisdiction to sentence Kimber to death.[20] This Court must reverse, vacate Kimber's sentence, and order that he be re-sentenced to life imprisonment without probation or parole.

On October 26, 2000, the state charged Kimber by indictment with one count of first degree murder and one count of armed criminal action.(LF20-21). The indictment did not allege statutory aggravating circumstances. The state filed notice of aggravating circumstances on January 4, 2001.(LF40-41). Defense counsel moved to quash the charging document for failure to comply with *Apprendi v. New Jersey*'s and *Jones v. United States*' command that, to comport with the Constitutions' due process, notice and jury trial guarantees, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven

[20] Kimber acknowledges that this Court has rejected a similar argument in *State v. Cole*, 71 S.W.3d 163, 171 (Mo.banc2002) and *State v. Tisius*, SC84036 (Mo.banc, 12/10/02). In neither of those cases, however, was this Court asked to consider the effect of *Bullington v. Missouri* on the issue. Kimber requests that this Court reconsider its earlier ruling in light of *Bullington*.

beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), *citing Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). Counsel preserved this challenge in the new trial motion.(LF513-15).

Under Missouri law, the maximum sentence that may be imposed for first degree murder is life imprisonment without probation or parole *unless* the trier finds at least one statutory aggravating circumstance beyond a reasonable doubt. §565.030.4(1)RSMo. As this Court has noted, "the jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence." *State v. Bolder*, 635 S.W.2d 673, 683 (Mo.banc1982); *accord*, *State v. Taylor*, 18 S.W.3d 366, 378 n.18 (Mo.banc2000); *State v. Shaw*, 636 S.W.2d 667, 675 (Mo.banc1982).

The aggravating circumstances set "the outer limits of a sentence, and of the judicial power to impose it, [and] are the elements of the crime for the purposes of the constitutional analysis." *Harris v. United States*, 122 S.Ct. 2406, 2419 (2002). That being the case, the other side of the coin is equally true—*without* proof of the statutory aggravating circumstance, the maximum penalty is life without parole. The statutory aggravating circumstances thus function to increase the penalty beyond what is, otherwise, the statutory maximum. They are "what the Framers had in mind when they spoke of 'crimes' and 'criminal prosecutions' in the Fifth and Sixth Amendments: A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all the facts to which the legislature had attached the maximum punishment." *Id*.at 2417.

Missouri's statutory aggravating circumstances are, under *Bullington* and *Harris*, elements of the offense of first degree murder for which the death penalty may be imposed. They function as facts that increase "the maximum penalty for a crime and operate as the functional equivalent of an element of a greater offense." *Ring v. Arizona*, 122 S.Ct. 2428, 2443 (2002), *citing Apprendi v. New Jersey*, 530 U.S. at 494 n.19. The Due Process Clauses of the Fifth and Fourteenth Amendments and the notice and jury trial guarantees of the Sixth Amendment thus require that they "be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id*.at 476, *citing Jones v. United States*, 526 U.S. at 243 n.6.

Indictments must set forth each element of the crime that they charge. *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998); *Hamling v. United States*, 418 U.S. 87, 117 (1974). If a conviction is had on a charge that has not been made, due process is denied. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). Art. I,§17 of Missouri's Constitution, which requires that "no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information," by implication also requires that all elements of the offense be contained in the charging document. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo.banc1992); *State v. Stringer*, 36 S.W.3d 821, 822 (Mo.App.,S.D.2001); *State v. Haynes*, 17 S.W.3d 617, 619 (Mo.App.,W.D.2000); *State v. Pride*, 1 S.W.3d 494, 502 (Mo.App.,W.D.1999). Further, if a statute provides that an offense may be committed several different ways, the indictment must state how it was committed this time to give the defendant notice so that he may prepare for trial. *Id*.; *State v. Murphy*, 787 S.W.2d 794, 796 (Mo.App.,E.D.1990).

Although the United States Supreme Court has never decided the precise question before this Court, it has repeatedly acknowledged the interplay between the three requirements recognized in *Apprendi* and *Jones*. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, **an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision."** *Apprendi v. New Jersey*, 530 U.S. at 480-81; *citing* 2 M. Hale, *Pleas of the Crown 170*; Archbold, *Pleading and Evidence in Criminal Cases*, at 51(emphasis added).

Facts that extend the sentence beyond what was otherwise the maximum were traditionally charged in the indictment and submitted to the jury because the indictment and the jury gave the state the authority to impose punishment. As the Court has recognized, "The evidence … that punishment was, by law, tied to the offense … and the evidence that American judges have exercised sentencing discretion within a legally prescribed range … point to a single, consistent conclusion: The judge's role in sentencing **is constrained at its outer limits by the facts alleged in the indictment** and found by the jury." *Harris v. United States*, 122 S.Ct. at 2418, *quoting Apprendi v. New Jersey*, 530 U.S. at 483 n.10(emphasis added). The facts contained in the indictment are critical to give the court jurisdiction. *Id*.at 478-79, *citing* 4 Blackstone 369-370.

The indictment filed in this case charged Kimber with one count of first degree murder for knowingly killing Kimberly Cantrell after deliberation. But, it failed to charge any aggravating circumstances that would allow Kimber to be subject to a death

sentence. As charged, therefore, the maximum punishment to which Kimber could be subject was life imprisonment without probation or parole. The trial court lacked jurisdiction to sentence Kimber to death. This Court must reverse, vacate Kimber's sentence and order that he be resentenced to life imprisonment without probation or parole.

XI. CONTINUANCE DENIED

The trial court abused its discretion in denying Kimber's verified motion for a continuance based on his need to locate a witness, Robert Smith, because this ruling denied Kimber due process, confrontation, effective assistance of counsel and freedom from cruel and unusual punishment under U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a), 21 in that Smith would have testified that Kimber did not enter the apartment building in which Orthell Wilson lived or talk to Orthell Wilson there the evening of August 22, 2000, and this would have impeached and directly rebutted the testimony of state's witness Donnell Watson, through whom the state attempted to link Orthell and Kimber in a plot to kill Kimberly Cantrell.

The state's case against Kimber was based, in large part, upon circumstantial evidence ostensibly linking Orthell Wilson and Kimber in a plot, hatched by Kimber, to kill Kimberly Cantrell. The state was allowed to present its case, calling all of the witnesses it desired. Kimber, however, was denied the opportunity to subject the state's case to the most basic form of adversarial testing. Although witnesses existed who would have rebutted the state's case and impeached their witnesses, Kimber was denied the opportunity to locate and then call them at trial. This Court must reverse and remand for a new trial.

On April 15, 2002, Kimber filed a verified motion for continuance. (LF387-98). Kimber alleged, *inter alia*, that the continuance was necessary to find Robert Smith, a witness in this case.(LF393). On April 16, counsel argued the motion, particularly noting that he was still trying to serve Robert Smith, a witness who would rebut the testimony of

the state's witnesses that Kimber met with Orthell Wilson at various times.(Tr209-11). The court denied the motion.(Tr212).

In guilt phase, the state called Donnell Watson, who had shared Orthell's apartment with him during 2000.(Tr1422-24). Donnell testified that, on August 22, 2000, he had taken Orthell after work to the intersection of Midland and Olive in University City, and he had let Orthell out of the car, carrying his black backpack.(Tr1430-36). Donnell testified that Orthell had come home that evening around 7:30 p.m.(Tr1439). He further testified that Kimber had come to the apartment that evening around 8 p.m. and had gone upstairs into Orthell's apartment, where the two men were alone.(Tr1441-42). Donnell also testified that Kimber had come to the apartment on August 21 and 23. (Tr1428,1444-47).

At the hearing on the new trial motion, Robert Smith testified. James Garrison, an investigator for the Public Defender System, testified that he had searched for but did not find Smith pre-trial in order to serve him with a subpoena.(Tr2070-72). Smith, who, like Orthell, had done maintenance work for Kimber at his apartments, recalled that the police came to the apartments on the evening of August 22, 2000 because a burglary had occurred at Smith's Uncle Robert's home.(Tr2059-62). Smith recalled that Kimber had come to the apartments in his van after the police left and walked around the building checking things like locks.(Tr2060-62). Smith did not see Kimber enter the buildings. (Tr2061).

During guilt phase deliberations, the jury asked specifically to see Orthell's statements, Kimber's statements and Hughie Wilson's deposition.(LF480;Tr1922). They also asked to see police reports by Detectives Gage and Siscel.(Tr1923).

To support a request for a continuance, a defendant must show that the absent witness's testimony can be obtained and is material. *State v. Patton*, 84 S.W.3d 554, 556 (Mo.App.,S.D.2002). If a continuance would not result in obtaining the witness's presence, no abuse of discretion will be found in the failure to grant a continuance. *State v. Fuller*, 837 S.W.2d 304, 307 (Mo.App.,W.D.1992). When ruling on a continuance request based on a witness's absence, the trial court can consider the probability that the witness cannot be found. *Id*. Reversal on appeal is warranted if the absent witness's testimony would probably result in a different outcome. *State v. Dodd*, 10 S.W.3d 546, 554-55 (Mo.App.,W.D.1999). The decision to grant or deny a continuance is a matter within the trial court's discretion and that decision will not be overturned absent a strong showing of abuse and prejudice. *State v. Taylor*, 944 S.W.2d 925, 930 (Mo.banc1997); *Rule 24.09*.

Here, denying counsel's continuance request was an abuse of discretion. While counsel's investigator was unable to find Smith pre-trial to serve him with a subpoena, Smith appeared with no difficulties at the hearing on the new trial motion, just two months later.(Tr2055). Thus, had a continuance been granted, Smith's appearance could and would have been obtained.

Smith's testimony was material. Had the jury heard it, the probability of a different outcome exists. The jury only heard from Donnell Watson that Kimber

allegedly was with Orthell on August 22, 2000, the night the state suggested that Orthell had killed Kimberly at Kimber's direction. Smith's testimony would have directly contradicted that testimony, and would have thus thrown doubt on Donnell's recollection of events. Even without Smith's testimony, the jury obviously wasn't content with what it had heard—asking the court to see Orthell's, Kimber's and Hughie's statements. Credibility was key. Yet, because the jury never heard Smith, they didn't hear a critical piece of evidence that would have buttressed Kimber's proclamation of innocence.

The trial court abused its discretion in denying Kimber's request for a continuance to obtain presence of Robert Smith. This Court should reverse and remand for a new trial.

XII. DISPROPORTIONATE SENTENCE

The trial court erred in accepting the jury's death penalty verdict and in sentencing Kimber to death and this Court, in the exercise of its independent duty to review death sentences under §565.035RSMo, should reduce Kimber's death sentence to life without probation or parole, because Missouri's death penalty scheme, both facially and as applied, violates U.S.Const.,Amends.5,6,8,14 and Mo.Const.,Art.I,§§10,18(a),21 in that the evidence was insufficient to support the sole aggravating circumstance the jury found; the evidence, including the state's misconduct at every phase, from jury selection forward, shows that Kimber's sentence was imposed because of passion, prejudice and other arbitrary factors; this Court's refusal to engage in meaningful proportionality review, including refusing to consider all similar cases, violates due process and does not comply with §565.035 RSMo, and Kimberly Cantrell's daughter, Erica, requested that Kimber not be sentenced to death, and the actual shooter, Orthell Wilson, was sentenced to life without probation or parole, and Kimber's sentence is thus excessive and disproportionate. All of these factors result in the arbitrary and capricious imposition of the death penalty.

This Court must "compare[e] each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate" and ensure a "meaningful basis [exists] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 198 (1978).

Erica Edwards is the daughter of Kimber Edwards and Kimberly Cantrell.(Tr991). Her family supports her wishes and beliefs.(Exh.JJJ). On June 13, 2002, Erica wrote to Judge Siegel asking "that you please spare my father's life."(Exh.JJJ). Erica does not forgive her father for what she believes he has done but "I do not want him to be executed…My Mother would not have wanted my father to be executed…Seeing my father executed would not give me closure. It will only make my life complicated and more unhappy."(Exh.JJJ). Despite Erica's request, Judge Siegel sentenced Kimber to death.(Tr2096-97). This Court should take the step Judge Siegel refused to and order that Kimber be resentenced to life without probation or parole.

Death sentences in Missouri must be supported by the jury's unanimous finding beyond a reasonable doubt of at least one statutory aggravating circumstance. *Ervin v. State*, 80 S.W.3d 817, 826 (Mo.banc2002); §§565.030(4), 565.035.3(2)RSMo. Due process demands that each element of an offense be proved beyond a reasonable doubt to sustain a conviction. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Statutory aggravators function as the element of the offense that must be proved in penalty phase for death to even be considered. *Ring v. Arizona*, 122 S.Ct. 2428, 2443 (2002); *Bullington v. Missouri*, 451 U.S. 430 (1981).

The sole aggravator that the jury found was that Kimber "hired Orthell Wilson and/or a person known only as Michael to murder Kimberly Cantrell."(LF494). The only evidence supporting that finding was Kimber's statements to police. Missouri courts have steadfastly adhered to the rule that, absent independent proof of the essential elements of the corpus delicti, the defendant's extrajudicial statements are inadmissible.

State v. Summers, 362 S.W.2d 537, 542 (Mo.1962); *State v. Crawford*, 32 S.W.3d 201, 205 (Mo.App.,S.D.2000); *State v. Hammons*, 964 S.W.2d 509, 512 (Mo.App.,W.D. 1998); *State v. Scott*, 996 S.W.2d 745, 747-48 (Mo.App.,E.D.1999). Such inadmissible statements are insufficient to sustain a conviction. *Id.; State v. Summers*, 362 S.W.2d at 542.

Since Kimber's statements were the sole evidence upon which the only aggravator the jury found was based, the evidence was insufficient to prove that element of the offense beyond a reasonable doubt. Lacking proof of that aggravator, Kimber's death sentence cannot stand.

Passion, prejudice and a host of arbitrary factors played a role in the imposition of Kimber's death sentence. §565.035.3(1)RSMo. Race played a role, since the state struck Jurors Burton and Evans peremptorily because they were African-Americans. *Batson v. Kentucky*, 476 U.S. 79 (1986). The state struck Evans, an African-American female, but not a similarly-situated white juror, Juror Tincu. *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo.banc2002). The state's attempts to justify its strike merely demonstrated it was pretextual since the explanation was not supported by the record. *State v. Butler*, 731 S.W.2d 265 (Mo.App.,W.D.1987). The state struck Burton, an African-American male, allegedly because he was a postal worker and, as such, he was a part of a bureaucracy. (Tr917). Yet, the state again chose not to strike similarly-situated white jurors, Meehan and Schumacher, who both worked for bureaucracies—one the City of Clayton, the other the federal government.(Tr919;Supp.L.F.6,17). Since jury challenges were made based on race, Kimber's death sentence cannot stand.

Kimber's death sentence is also unreliable since the defense was denied the opportunity to explore with the venire their views on critical facts. The court sustained the state's objection and disallowed questioning by the defense on whether the jurors could legitimately consider imposing life without probation or parole if they knew that Kimber had arranged the death of his ex-wife, "the mother of his child." (Tr343-46).

Having ensured that the defense could not question jurors about this issue, the state then built its case on engendering sympathy from the jury for Kimberly and her daughter, Erica. Throughout guilt phase, culminating in his guilt phase closing, where Sidel told the jury,

> This (indicating) beautiful woman, Kimberly Cantrell, this beautiful woman and this (indicating) beautiful child, all over three hundred fifty-one dollars a month… This (indicating) child was denied the joy of having her mother seeing her while she is going to high school proms, the joy of having her mother help her plan her wedding, the joy of her mother seeing her daughter grow in with a family, this child will never have that and this is for three hundred and fifty-one dollars a month.(Tr1881).

Then, in penalty phase, Sidel continued his mantra, culminating in his final closing, "What he did is he took this woman, this woman, whose picture you've already seen with her arm around her daughter at a family reunion…"(Tr2047). And, finally, he stated "This love of Erica, this child he wouldn't even support, I don't buy it."(Tr2048).

Kimber was entitled to a fair and impartial jury, which encompasses the right to "an adequate voir dire to identify unqualified jurors." *State v. Clark*, 981 S.W.2d 143,

146 (Mo.banc1998), citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). If voir dire is inadequate, trial courts cannot fulfill their responsibility to remove jurors who will be unable impartially to follow and apply the instructions. *Morgan*, 504 U.S. at 729-30. Thus, "a liberal attitude is allowed in the examination of jurors." *State v. Clark*, 981 S.W.2d at 146, citing *State v. Granberry*, 484 S.W.2d 295, 299 (Mo.banc1972). Despite this liberal attitude, on this critical issue, Kimber was denied all opportunity to explore the jurors' biases and prejudices.[21] As the re-trial of Mr. Clark demonstrates, voir dire on critical issues can make the difference between life and death. *State v. Clark*, 45 S.W.3d 501 (Mo.App.,E.D.2001). Kimber's sentence was unreliable.

Kimber did not testify in penalty phase. Counsel requested that the court give Instruction D, based on MAI-Cr3d308.14, the so-called no-adverse-inference instruction, but the court refused.(LF492;Tr1988-89). At the new trial motion hearing, the court stated "The Supreme Court is going to have to tell me that the instructions were erroneous. I don't feel they were under these circumstances and I stick by my decision to refuse to give that instruction in this particular case in the penalty phase."(Tr2093).

This Court, in *State v. Storey*, 986 S.W.2d 462 (Mo.banc1999) and *State v. Mayes*, 63 S.W.3d 615 (Mo.banc2001), held that the failure to give the no-adverse-inference

[21]Making the denial of voir dire even more egregious was the state's decision to utilize the very fact upon which voir dire had been denied as the corner-stone of its case. This is similar to and equally as improper as securing the exclusion of evidence and then arguing its absence to the jury. *State v. Weiss*, 24 S.W.3d 198, 202-03 (Mo.App.,W.D.2000).

instruction upon request in penalty phase is error. This holding comports with rulings by the United States Supreme Court. *Carter v. Kentucky*, 450 U.S. 288 (1981); *Estelle v. Smith*, 451 U.S. 454 (1981).

Kimber's jury, like *Storey*'s, never heard the no-adverse-inference instruction. In an independent Fifth Amendment violation, *De los Santos v. State*, 918 S.W.2d 565 (Tex.App.1996), the state argued in penalty phase closing, "What's the one thing we haven't heard about that Kimber Edwards has expressed to anyone, remorse. Any remorse, any sadness about the killing of Kimberly Cantrell and why haven't you heard about it? Because he hasn't obviously expressed it to anybody."(Tr2031). Since the jury never heard the instruction, the inferences the jury may have drawn from Kimber's silence "may be unfairly broad," *State v. Storey*, 986 S.W.2d at 465, citing *Carter v. Kentucky*, 450 U.S. at 301 n.17. A death sentence fashioned from such material cannot stand.

This Court must determine if the death sentence is excessive or disproportionate to the penalty imposed in similar cases. §565.035.3(3)RSMo. The most similar of all cases is that of Orthell Wilson, the man who actually shot Kimberly Cantrell. At trial, the defense sought to introduce a certified copy of the judgment and sentence in *State v. Orthell Wilson*, Cause No.00CR-3701, in which Orthell Wilson was sentenced to life without the possibility of probation or parole for first degree murder and concurrent straight life for armed criminal action.(Exh. III;Tr1989). The court denied that request. (Tr1989).

While the jury was denied the opportunity to hear this relevant evidence, this Court must consider it. The man who pulled the trigger, killing Kimberly Cantrell, was sentenced to life without parole. In other Missouri cases involving the contract killing of a spouse, while the shooters have been sentenced to death, the surviving spouses have not. *See State v. Clay*, 975 S.W.2d 121, 146 (Mo.banc1998); *State v. Basile*, 942 S.W.2d 342 (Mo.banc1997); *United States v. Basile*, 109 F.3d 1304 (8thCir.1997). No meaningful way exists to distinguish Kimber's case from those in which the death penalty was not imposed. *Gregg v. Georgia*, 428 U.S. at 198.

The trial judge heard Erica Edwards, Kimberly's daughter, who argued passionately that her father, the man she believed engineered her mother's death, not be sentenced to death.(Tr2093-95;ExhJJJ). While this Court has rejected prior pleas to set aside death sentences based on the victims' family members for a life sentence, *see State v. Barnett*, 980 S.W.2d 297, 308 (Mo.banc1998), it is authorized under §565.035.3(3)RSMo to consider whether the sentence is excessive or disproportionate, considering the crime, the strength of the evidence and the defendant. Erica Edwards asked that the court spare her father's life because "I believe everyone should die only according to when God is ready for them. My mother did not get a chance to see when God was ready for her and I think my father needs time to think about this." (ExhJJJ). According to Erica, to not sentence Kimber to death will accomplish more than sentencing him to death—it will give him the opportunity to learn from this experience. This Court should exercise its independent power of review to do more than merely rubber-stamp the trial court's actions.

Sentencing someone to death is cruel and unusual punishment if the punishment is meted out arbitrarily and capriciously. *Furman v. Georgia*, 408 U.S. 238 (1972). Appellate comparative proportionality review is not constitutionally-required, *Pulley v. Harris*, 465 U.S. 37 (1984), but §565.035RSMo provides for it. Due process is denied if it is not provided. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

This Court's proportionality review is fatally flawed. It does not provide timely notice of the proceedings or a meaningful opportunity to be heard and to argue the strength of one's case and to attack the opposing party's case. *See Harris v. Blodgett*, 853 F.Supp.1239, 1287-88 (W.D.Wash.1994). Its definition of "similar cases" includes only those cases in which death was imposed, not all factually similar cases. *State v. Gray*, 887 S.W.2d 369, 389 (Mo.banc1994). Its analysis is thus skewed toward finding proportionality. *Harris v. Blodgett*, 853 F.Supp. at 1287-88; *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994). Further, since the parties only discover what cases this Court deems "similar" when they receive the opinion, they have no opportunity to subject those findings to adversarial testing. This Court's failure to do adequate proportionality review violates due process.

This Court should set aside Kimber's sentence and resentence him to life imprisonment with no possibility of probation or parole.

CONCLUSION

Based on the foregoing arguments, Kimber requests that this Court reverse and remand for a new trial, for a new penalty phase, or vacate his death sentence and re-sentence him to life without parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of _____, 2003, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 30,264 words, which does not exceed the 31,000 words allowed for an appellant's opening brief.

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Janet M. Thompson